

Before the
POSTAL REGULATORY COMMISSION
WASHINGTON DC 20268-0001

Modern Rules of Procedure
for the Issuance of Advisory Opinions
in Nature of Service Proceedings

Docket No. RM2012-4

PUBLIC REPRESENTATIVE'S COMMENTS

(July 29, 2013)

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I. Introduction

In Order No. 1738, the Commission issued a set of proposed rules addressing “the need for more timely completion of nature of service proceedings.”¹ This filing is submitted in response to the Commission’s invitation for comments on the proposal in the undersigned attorney’s capacity as the Public Representative in this docket.

The Comments offer preliminary observations on several general points and discuss the potential impact of specific rules. Attachments to the Comments provide supporting documents. The Comments do not address the degree of change in service that triggers section 3661 review; they assume good faith compliance with statutory requirements.

II. Preliminary Observations

A. The Commission has tackled some of the biggest challenges in revising section 3661 procedures

In the preamble to the proposed rules, the Commission candidly acknowledges that imposing time deadlines on N-Cases “without fatally impairing the ability of participants to develop an adequate factual record by means of discovery and cross-examination” has presented a number of challenges. 78 FR 35815. The Public Representative appreciates the Commission’s efforts to consider the impact of its

¹ Order No. 1738 was issued in Docket No. RM2012-4 and published at 78 FR 35812 (June 14, 2013). It is also referred to as “Advance Notice” within. “Nature of service” proceedings refer to cases involving a Postal Service request for an advisory opinion on nationwide service changes brought under section 3661 of title 39, U.S. Code. The “N” in “N-Case” reflects a Commission docketing convention for dockets addressing section 3661 requests. Order No. 1738 appointed the undersigned attorney as Public Representative. Kenneth R. Moeller, of the Commission’s Office of Accountability and Compliance, assisted with the preparation of the Comments.

proposed rules on participants' due process rights. In addition, the Commission, as the issuer of the advisory opinion, must satisfy itself that the record is complete. It cannot depend on participants, alone, to develop the record. The absence in the proposed rules of any limit on Notices of Inquiry and Commission- or Chairman-issued information requests supports this need, and is appropriate.

B. The Commission Clarifies Two Important Points

Order No. 1738 usefully addresses the Commission's reaction to two points that emerged as areas of particular interest in comments filed in response to the Advance Notice. These include:

- the Commission's reference to the *Citizens Awareness* case; and
- one or more "hard" deadlines on issuance of an advisory opinion (tied to complexity of the request).

With respect to the first point, some commenters responding to the Advance Notice expressed concern that the Commission intended to curtail procedural due process by adopting an approach used by the Nuclear Regulatory Commission in licensing proceedings. In the preamble to the proposed rules, the Commission explains this was not its intention. It states, instead, that the reference to *Citizens' Awareness* was made to support the more general proposition that agencies have flexibility to tailor their procedures to make hearings more efficient. 78 FR at 35814.

This clarification diffuses some of the most intense criticism of the Advance Notice.

With respect to the second point, the Commission states that it favors, at least tentatively, imposing a qualified time limit on the issuance of an advisory opinion. This takes the form of a pre-filing stage (when the "clock" for completion of a section 3661 proceeding does not tick) and a 90-day official period (during which the clock ticks). Extensions are allowed for good cause or for an incomplete filing (with "incomplete" including "significant modification"). 78 FR 35822.

The proposed approach may be controversial. However, it was essential, at this stage of the rulemaking, that the Commission clearly signal its intention to address administration of section 3661 and state its preference on how to proceed. The Commission has done so in Order No. 1738.

C. Subpart D, as Revised and Reorganized, Provides Greater Transparency and Promotes Efficiency

The Commission improves the format and organization of the N-Case rules by retaining the use of a separate Subpart D, and transferring to this subpart some provisions that previously appeared Subpart A.

A more self-contained Subpart D promotes transparency and efficiency. It will allow those who are not expert in the Commission's administrative practice to get a better understanding of the scope of requirements. And, for seasoned veterans, it will be more efficient than scrolling through the rules to check the applicability of provisions in other subparts. The Public Representative supports retention of this approach in future versions of the N-Case rules, and suggests that moving more of the notice provisions in section 3001.17 to Subpart D should be considered.

III. The Distinction between a Deadline for Filing of an Advisory Opinion Request and the Absence of a Deadline for Commission Action Can be Traced to the Original Set of Rules

Section 3661, captioned "Postal services," provides in pertinent part:

(b) When the Postal Service determines that there should be a change in the nature of postal services which will generally affect service on a nationwide or substantially nationwide basis, it shall submit a proposal, within a reasonable time prior to the effective date of such proposal, to the Postal Regulatory Commission requesting an advisory opinion on the change.

(c) The Commission shall not issue its opinion on any proposal until an opportunity for hearing on the record under sections 556 and 557 of title 5 has been accorded to the Postal Service, users of the mail, and an officer of the Commission who shall be required to represent the interests of the general public. The opinion shall be in writing and shall include a certification

by each of the Commissioners agreeing with the opinion that in his judgment the opinion conforms to the policies established under this title.

As a reading of this provision indicates, section 3661 does not impose any “hard” time limits on the filing of the Postal Service’s request, but speaks more generally to the filing being submitted for Commission consideration “within a reasonable time prior to” the intended effective date. Similarly, section 3661 does not impose a hard deadline for issuance of an advisory opinion, but links issuance to some indefinite point *after* the Commission had provided the Postal Service and others with an opportunity for “a hearing on the record under sections 556 and 557 of title 5.” (Widely understood to mean “trial-type proceedings.”) In short, section 3661 left imposition of time limits on section 3661 proceedings (if any) to agency discretion.

So some may wonder how it came to be that an explicit timeframe applies to the initiation of a section 3661 case, but not to its completion. The answer is that the Commission adopted the original set of “N-Case” rules in 1971 as part of an initial rulemaking addressing the newly-formed agency’s major responsibilities under in the Postal Reorganization Act of 1970 (PRA).² See Attachment No. 1. The rules reflected the Commission’s preference that the Postal Service file a section 3661 request “not less than 90 days” in advance of the proposed implementation date, and that final action on the request not be tied to a time certain.

As a matter of drafting logic, the Commission located the rules within Subpart D of part 3001 of the Commission’s rules of practice and procedure.³ The subpart was captioned “Rules Applicable to Requests for Changes in the Nature of Postal Services” and consisted of five numbered provisions. Section 3001.71 noted that the rules governed the procedure for a § 3661 request, but also included a sentence stating: “The Rules of General Applicability in Subpart A of this part [3001] are also applicable to proceedings no requests subject to this subpart [D].

² See Docket No. RM71-1, 36 FR 396, 407.

³ 39 CFR 3001.71-75.

This reflects an organizational approach favored by many agencies: coupling a relatively extensive set of rules of general applicability (such as Subpart A of the Commission's rules) with a smaller set of case-specific rules. In the 1971 rulemaking, the outcome was five discrete provisions in Subpart D, captioned as follows:

Subpart D—Rules Applicable to Requests for Changes in the Nature of Postal
Services

Sec.

3001.71 Applicability.

3001.72 Filing of formal requests.

3001.73 Filing of prepared direct evidence.

3001.74 Contents of formal requests.

3001.75 Service by the Postal Service.

None of the provisions in Subpart D addressed issuance of the Commission's advisory opinion.

Post-1971 developments. Until the Commission's recent issuance of the proposed rulemaking, the original Subpart D rules had survived relatively intact, with only minor amendments for conforming changes driven by revisions to the rules of general applicability in Subpart A. However, as section 3661 requests have grown more complex, the time required to issue an advisory opinion has increased. This, in turn, has generated interest in re-examining the continued utility of conventional features of the hearing process and the absence of a firm deadline for issuance of the Commission's advisory opinion.

Conceptually, Order No. 1738 signals the Commission's conclusion that adopting a goal of issuing an advisory opinion within 90 days is preferable to the open-ended approach of the past and to other options identified in comments on the Advance Notice. It also signals a corresponding willingness on the part of the Commission to re-imagine and re-engineer its longstanding approach to N-Cases to achieve that goal. The result is a proposal that introduces a new off-the-record pre-filing stage; eliminates "limited participator" status; clarifies the scope of a section 3661 proceeding; and

proactively addresses the potential for delay attendant to key components of the hearing process by, among other things, shortening deadlines and placing limits on interrogatories.

The Commission's proposal makes clear that considerable effort has gone into tackling chronic problems with the administration of section 3661. At the same time, the proposal is ambitious and, some may say, aspirational in contemplating that the new 90-day target can be met without compromising due process or resorting, as a matter of routine, to extensions for good cause or incompleteness. Nevertheless, the proposed rulemaking provides the postal community with an opportunity to comment on the Commission's blueprint for building a new, effective framework for section 3661 cases.

IV. The Interests of the General Public

The interests of the general public in this rulemaking primarily involve ensuring that the proposed revisions adequately address due process considerations. The remaining sections of these Comments therefore focus mainly on:

- the proposed pre-filing stage, including ex parte restrictions and certain due process tradeoffs associated with this stage;
- elimination of limited participator status;
- the scope of 3661 proceedings;
- the apparent treatment of responses to interrogatories seeking data and information as "document requests" and a ban on certain requests;
- the seeming (and presumably unintended) omission in the text of proposed Subpart D of discovery rights for the Postal Service, including with respect to rebuttal testimony; and
- the role of participants supporting the Postal Service's proposed change in service.

These issues (and related matters) are addressed, where feasible, in the context of the bulleted items in Order No. 1738 (at 78 FR 35815), in order of presentation by the Commission.

V. First Bulleted Item

A requirement that N-Cases conducted within a fixed time period provide a pre-filing phase during which a free and open exchange of information is conducted

Section 3001.81, captioned “Pre-filing requirements,” reflects the greatest departure from existing practice. It requires the Postal Service to engage in discussions with “potentially affected participants” before filing a formal request for an advisory opinion on proposed changes in the nature of postal services.

The Commission states that this proposal stems from a suggestion of the American Postal Workers Union, AFL-CIO (APWU) in comments filed in response to the Advance Notice; an awareness that informal, pre-filing discussions have occurred in the past; and the Commission’s interest in reviewing as complete a filing as possible, without major errors or omissions. However, the pre-filing period described in the proposed rule is not exactly as envisioned by APWU because it also serves, in part, as a rationale for limits on interrogatories, abbreviated time frames for certain stages and actions in the successor “official” proceeding, and changing certain hard copy filing requirements. APWU, at a minimum, did not support time limits on the formal request.

The following discussion addresses two scenarios: adoption of the proposal without material change and adoption of an alternative to the pre-filing stage.

Under the first assumption, the advantages the Commission sees in an informal pre-filing phase are clear. They include encouraging a well-thought proposal; allowing for large, but necessary, changes; and leaving only smaller and less substantial changes for the formal proceeding. This stage may also allow the Postal Service to reach understandings with interested parties, with corresponding benefits that expedited the official proceeding, such as fewer discovery requests, motions, or filings.

These are worthwhile objectives, and the proposed pre-filing stage, as envisioned, may facilitate achieving them. However, the Commission also sees the pre-filing stage as a means of providing participants *in the official proceeding* with due process.

First, one concern is that preserve certain one or more rights, interested persons would be *required* to participate in an unofficial proceeding or risk have those rights compromised. For example, hard copy service is eliminated in proposed section 3001.74 except for those who notify the Postal Service during the *prefiling stage* of their status. The Public Representative agrees that hard-copy service poses a burden for the Postal Service, but this approach to addressing that issue is not fully consistent with due process. Persons intervening in the official stage who did not participate in pre-filing stage conferences should be allowed to seek hard copy service, as they can under existing rules. Eventually, the widespread use of personal computers and access to the internet should put an end to requests for hard copy service. To the extent hard copy requests remain a factor, a request made for the first time in the official stage should be accommodated.

Second, the requirement that the Postal Service contact “potentially affected persons” is well intentioned, and clearly designed to cast a wide net. In doing so, however, it may be too vague to allow the Postal Service to meet its obligation under the rule. Assuming adoption of the pre-filing stage, an express direction to contact all participants in the past five N-Cases, all participants in a certain number of PAEA-era rate and complainant cases provides more certainty that “potentially affected persons” will be reached.

Third, *ex parte* prohibitions will attach to the pre-filing stage. Existing Commission rules address *ex parte* communications rules in several places. One is in section 3000.735-501, within the Commission’s Standards of Conduct for employees. In brief, the restrictions in this rule are triggered under two circumstances: (1) when the communication concerns a particular matter at issue in contested proceedings before

the Commission or (2) the substantive merits of a matter that is *likely to become a particular issue in contested proceedings* before the Commission. (Emphasis supplied.)

This section further provides:

A particular matter is at issue in contested proceedings before the Commission when it is a subject of controversy in a hearing held under 39 U.S.C. 3624 or 3661(c) [N-Case proceedings]. However, this section does not prohibit participation in off-the-record proceedings adopted by the Commission for hearings held under 39 U.S.C. 3624 or 3661(c) [N-Case proceedings].

It appears that the pre-filing period would be covered by section 3000.735-501's reference to "a matter that is likely to become a particular issue in contested proceedings before the Commission." It seems the Public Representative's participation in off-the-record proceedings during the pre-filing stage also would be covered by this provision.

The Commission is justified in assuming that all participants are on notice that the pre-filing stage will trigger the application of the *ex parte* rules. However, given the importance of the *ex parte* prohibitions, consideration should be given to placing persons on notice, via an explicit statement in the preamble or proposed rules, that these restrictions apply during the pre-filing stage. Clear guidance is essential to avoid inadvertent or unwitting violations.

Fourth, the proposal expressly states that pre-filing conferences are not on the record. The reasons for this are clear: the encouragement of free and full discussion and reducing the need for extensive discovery during the formal proceeding. However, these objectives might operate at cross-purposes (or at least not as well as they could) because if the information provided is off the record, a participant presumably would have to request it again during the formal proceeding. Moreover, although certainly not intended by the Commission, the "free exchange" has the potential to develop into a case unto its own, with tugs of war over access to data and information, including

nonpublic material, without recourse to the good offices of the Commission for resolution.⁴

Finally, the potential also exists that there will be too few participants in the pre-filing stage (as clients may not want see the advantages of representation at this point or not be willing to fund it) or gridlock from too many participants with only a marginal interest in the proposed change.

Alternative. The Public Representative supports the Commission's interest in improving administration of section 3661 requests. It acknowledges that some of the drawbacks mentioned above — especially the hard copy service issue — can be remedied rather easily and effectively. However, the difficulty of offering a pre-filing stage without encumbering it with unresolved discovery disputes and mandatory due process tradeoffs suggests that consideration should be given to another approach: namely, achieving the objectives of the pre-filing stage by offering most of its features (and more) under the umbrella of a formal proceeding, *as long as* the formal proceeding starts with a well-defined Provisional (or Conditional) Acceptance phase that does not start the 90-day clock.

In short, the Commission might be able to achieve its objectives — and minimize drawbacks — by re-casting the pre-filing stage as a “Conditional Acceptance” phase of a docketed case. This would continue to allow off-the-record discussions (for at least some time); give legitimacy to participants' discovery requests; allow some form of active Commission involvement and investigation (such as issuing information requests); and give the Commission some control over how long the conditional phase lasts. *All* stakeholders — including the Commission — would be involved at an early

⁴ Commission rule 3001.5(o) provides: “*Ex parte communication* means an oral or written communication not on the public record with respect to which reasonable prior notice to all participants and limited participators is not given, but it shall not include requests for status reports on any matter or proceeding covered by subchapter II of chapter 5 of title 5 [such as rulemakings, adjudications, or hearings] or a proceeding conducted pursuant to part 3025 [appeals of Postal Service determinations to close or consolidate post offices] of this chapter. 39 CFR 3001.5(o). Commission rule 3001.7(b) also addresses ex parte communications.

stage, unlike the proposed approach, where the Commission remains aloof, waiting for word that the pre-filing stage (which has no time limit) has concluded.

“Conditional acceptance” is a practice agencies employ at different stages of proceedings for various purposes. This practice can serve a gatekeeping function at the outset of a proceeding to ensure that filing requirements have been met. It can be used during a proceeding to manage case flow. And it is often used at the conclusion of a proceeding, upon issuance of an order or opinion, to qualify an action or right.

An example of how this concept might apply, at least in part, to section 3661 proceedings can be found in the U.S. International Trade Commission’s rules of practice for the initial stage of a formal investigation referred to as “preinstitution processing” of a section 337 complaint. Excerpts from the rules, which are part of Subpart B—Commencement of Preinstitution Proceedings and Investigations, are reproduced below.⁵

§ 210.9 Action of Commission upon receipt of complaint.

Upon receipt of a complaint alleging violation of section 337 of the Tariff Act of 1930, the [U.S. International Trade] Commission shall take the following actions:

- (a) *Examination of complaint.* The Commission shall examine the complaint for sufficiency and compliance with the applicable sections of this chapter.
- (b) *Informal investigatory activity.* The Commission shall identify sources of relevant information, assure itself of the availability thereof, and, if deemed necessary, prepare subpoenas therefore, and give attention to other preliminary matters.

§ 210.10 Institution of investigation.

- (a)(1) The Commission shall determine whether the complaint is properly filed and whether an investigation should be instituted on the basis of the complaint. That determination shall be made within 30 days after the complaint is filed, unless—
 - (i) Exceptional circumstances preclude adherence to a 30-day deadline;
 - ... (ii) Additional time is allotted under other sections of this part in connection with the preinstitution processing of a motion by the complainant for temporary relief;

⁵ Under section 337, the USITC determines whether there is unfair competition in the importation of products into, or their subsequent sale in, the United States. For more information, please access <http://www.usitc.gov>. The excerpts are from the pdf version captioned “USITC Rules of Practice and Procedure including updates through June 20, 2013” on the USITC website.

- (2) If exceptional circumstances preclude Commission adherence to the 30-day deadline for determining whether to institute an investigation on the basis of the complaint, the determination will be made as soon after that deadline as possible.
- (3) If additional time is allotted in connection with the preinstitution processing of a motion by the complainant for temporary relief, the Commission will determine whether to institute an investigation and provisionally accept the motion within 35 days after the filing of the complaint or by a subsequent deadline computed in accordance with § 210.53(a), § 210.54, § 210.55(b), § 210.57, or § 210.58 as applicable.

In short, recognizing the pre-filing stage as an official part of a formal proceeding, as the International Trade Commission does for section 337 cases, may be a viable alternative to a prefiling stage.

VI. Second Bulleted Item

Revised filing requirements intended to confirm that information was freely exchanged during the pre-filing period and which encourage submission of a complete and final service change proposal

Retention of existing filing requirement for the Postal Service. Proposed § 3001.82 is notable, for the purpose of these Comments, primarily for the fact that it continues to be the location of the longstanding 90-day advance filing requirement to which the Postal Service is subject.⁶ Related section 3001.83, captioned “Contents of formal requests,” adds the following item (in subsection (b)(4)) to the list of requirements in the existing rule:

A statement that the Postal Service has completed the pre-filing conference(s) required by 3001.81, including the time and place of each conference and a summary of discussions at the pre-filing conference(s)

This provision is facially consistent with the Commission’s proposed introduction of a pre-filing stage. However, assuming a pre-filing stage is adopted as proposed, a question arises about the appropriateness of requiring the Postal Service to provide a summary of discussions that took place in one or more off-the-record conferences. The

⁶ Section 3001.80, captioned Procedural Schedule, also mentions the 90-day schedule.

knowledge that the Postal Service, by rule, would later be required to divulge the content of the discussions that took place, even in summary fashion, is likely to have a chilling effect on participation.

In addition, in the preamble to Order No. 1738, the Commission states that when filing a request for an advisory opinion, the Postal Service would be required to explain how it made a good faith effort to address criticisms and suggestions made by interested persons. 78 FR 35816. This does not seem to have been incorporated into sections 3001.82 or 3001.83 or elsewhere in Subpart D. The Public Representative does not support inclusion of this requirement as a component of the Postal Service's notice. It defeats one of the premises inherent in providing "off the record" discussions (that matters discussed will not be disclosed in a manner that identifies participants) and bolsters the possibility that the pre-filing phase might function as a case unto itself, with few of the safeguards associated with the cover of a docketed Commission proceeding.

Institutional witness. Section 3001.83 also adds a requirement that the Postal Service provide the name of an institutional witness capable of providing information relevant to the Postal Service's proposal that is not provided by other Postal Service witnesses and confirmation that the institutional witness will be available for a mandatory technical conference (a new requirement in rule 85). (This differs from the practice of having an institutional witness sponsor answers to interrogatories.)

The use of an institutional witness as a contact person for resolving minor points is now an established practice in Commission proceedings. Extending it to N-Cases seems practical and unobjectionable. The Public Representative supports this requirement.

VII. Third Bulleted Item

The issuance of an initial notice and scheduling order based upon a pro forma procedural schedule that provides for completion of the proceeding within a fixed time period

The new 90-day deadline for completion of Commission action on a section 3661 request appears in proposed section 3001.72(a) and in proposed section

3001.80(a)(12). The fact that this is a target, rather than a firm deadline, is established in proposed sections 3001.72(a) and 3001.80(b) through a good cause exception. Proposed section 3001.80(b) also allows good cause as a rationale for extending other deadlines, as does proposed section 3001.80(c) upon a Commission determination that a request is incomplete, where incomplete covers "significant modifications." 78 FR 35822.

The good cause exceptions appropriately acknowledge the need for a safety valve. However, an explanation or discussion of the types of events the Commission thinks might constitute "good cause" for extending deadlines in the procedural schedule pursuant to proposed section 3001.80(b) is essential to put participants on notice of events that might affect the proceeding, including their own availability and the availability of witnesses.

Moreover, "good cause" for extending a deadline to file a notice of *intent* to file rebuttal testimony (an "advance warning" filing) might differ from extending the deadline for filing the testimony itself (as this would delay review by the Commission and others). Similarly, "good cause" for extending the deadline for issuing an advisory opinion may (and perhaps should) differ from good cause for extending filing deadlines. The reference to "significant modifications" in proposed section 3001.80(c) would also benefit from amplification.

"Public health, safety and welfare" is a standard good cause rationale employed by many federal agencies, but does not seem to have relevance to N-Cases. Apart from a government shutdown, the need to ensure that participants are accorded due process may prove to be the most likely rationale for invoking "good cause" as a reason to extend interim deadlines. This may also be the chief reason for an extension during the post-briefing phase, when participants are no longer actively involved.

The Public Representative does not press for inclusion of specifics in the rules proper, but for explanation and, if possible, examples in the preamble. This will provide notice to the Postal Service and others and minimize the potential for disputes during the pendency of a service change request.

Elimination of “direct case” (relative to rebuttal case). In section 3661 proceedings to date, the procedural schedule has allowed for direct, rebuttal, and surrebuttal testimony. The proposed rules eliminate any role for direct testimony (except in the context of the Postal Service’s request), but retains rebuttal and surrebuttal testimony.

As drafted, the proposed rules contemplate — and account for — opposition to the Postal Service’s proposal (by explicitly allowing for rebuttal testimony), but create some confusion over the rights of the Postal Service and supporters of the Postal Service’s proposal. It appears that a supporter of the Postal Service’s proposal would not file a “direct” case or testimony, but could apply to file surrebuttal testimony under proposed section 3001.91 rule *if* there is related rebuttal testimony. And, if no rebuttal testimony is filed, a supporter’s involvement appears to be limited to the briefing stage.

This may be the result the Commission intended with respect to supporters, who have due process rights in section 3661 proceedings that differ, in application, from those of critics of the proposal. It may be that no explicit provision for direct testimony of a supporter is needed. However, allowing a supporter to file Comments in Lieu of a Brief, without the formalities attendant to surrebuttal testimony or a legal brief, might be a pragmatic and APA-compliant avenue for getting supporting views on the record. In any event, clarification of the role of supporters of the Postal Service’s proposal would be useful.

Moreover, review of the preamble, the text of specific provisions, and the pro forma schedule in proposed Subpart D indicates there is no explicit provision for the Postal Service to file discovery against other participants. It may be the intention that discovery rights in the rules of general applicability are to come into play, but honoring the deadlines in those rules would undo the expedited N-Case schedule. The Postal Service clearly has discovery rights in N-Cases, but the proposed rules do not explicitly recognize these rights, nor does the pro forma schedule accommodate them. The Public Representative urges that the Commission explicitly recognize the Postal Service’s rights in the text of the rules and adjust the pro forma schedule accordingly.

The Public Representative makes no specific recommendation at this point as to specific adjustments to the schedule.

Oral argument. The procedural schedule does not provide for oral argument. The Public Representative supports this approach, and suggests that the preamble include affirmative mention of this fact to dispel any expectations that it might be available, other than at the Commission's discretion.

VIII. Fourth Bulleted Item

Elimination of the "limited participator" status in N-Cases

In the preamble to the proposal, the Commission notes that APWU has suggested revising the definition of limited and full participants. 78 FR 35816. The Commission then states that in the interest of simplifying the process and standardizing the level of participation among all parties, it proposes to eliminate this distinction in N-Case proceedings. *Id.* The Commission accomplishes this by revising section 3001.20a in the rules of general applicability and cross-referencing that provision in proposed Subpart D.

The Commission formally introduced the category of "limited participator" in Docket No. RM73-2.⁷ The rationale for introducing this hybrid status was a significant increase (in a different rulemaking) in the information full participants were required to file. The Commission recognized that some mailers may not be able to participate except on a limited basis, so developed the limited participation rule to grant them access to Commission proceedings without automatically subjecting them to the entire gauntlet of filing and discovery requirements. See Order No. 31 at 1. Modifications since adoption of the initial rule require a limited participator to respond to discovery requests directed to testimony sponsored by the limited participator, but not to any other discovery requests.

The Commission's proposal goes much farther than APWU's suggestion and, under the label of "equal opportunity" for discovery, reverses many years of relatively

⁷ See Order No. 31; 38 FR 3510 (Feb 7, 1973).

uneventful experience with limited participation. Section 3661 proceedings, by their very nature of addressing service changes, affect many types of mail users, including those not represented by organized or well-funded groups, so limited participation provides an avenue for some to present their views to the Commission without needing to hire a lawyer ... or having to become one.

Apart from this important principle, the Public Representative notes, as a practical matter, that limits on interrogatories should minimize the chance that a limited participator will unduly drain Postal Service resources or derail timely completion of a section 3661 proceeding. As a frame of reference, Attachment B shows, based on a review of several N-Cases, that participants filed anywhere from no interrogatories to 168.

At the same time, the Public Representative believes a review of the efficacy of the limited participator rule in all proceedings (where opting for that status is allowed) is long overdue. She suggests that, as with the issue of access to confidential material raised in comments on the Advance Notice, the Commission defer a decision on limited participator status until there can be a broader discussion. Should the need to address limited participation in section 3661 proceedings arise before that review occurs, adoption of special rules of practice would allow the Commission to handle this issue on a case-specific basis.

IX. Fifth Bulleted Item

Expedited filing deadlines for filing and responding to motions

Proposed section 3001.75, among other things, establishes new, compressed deadlines for motion practice. The following discussion focuses on motions related to discovery, which are the type most often seen in N-Cases.⁸

⁸ As the Postal Service has the right to request an advisory opinion under section 3661, a motion to dismiss an N-Case would appear to be a rare instance, barring expanded requirements for the contents of a filing. Few motions to strike testimony have been filed in any Commission proceedings, including N-Cases.

Under proposed section 3001.75(b), a motion to be excused from answering a discovery request would be due within 3 days of receipt of the request. An answer to the motion (typically an opposition) would be due within 2 days. 38 FR 35822. If the motion is not granted, the answer to the discovery request would be due within 3 days of the denial. (Proposed section 3001.75(b)(3).

The compressed deadlines would be difficult to meet under the best of circumstances, regardless of a participant's resources. Counting calendar days (accomplished through a proposed change to section 3001.15) exacerbates the problem. Without some relaxation, motions for extension of time may become routine.

Given its unique status in N-Cases, consideration should be given to allowing the Postal Service more time for filing a motion to be excused from answering a discovery request, given that determinations with respect to the need to seek such relief may take some time to establish (and gain internal approval). In addition, some consideration should be given to stemming a potential flood of motions for late acceptance by allowing a grace period of one day's delay before requiring an accompanying motion for late acceptance. The motion for late acceptance would be understood.

X. Sixth Bulleted Item

New N-Case discovery procedures that build upon the pre-filing conference and which include a provision for an initial mandatory technical conference; a limitation on the number of written interrogatories; and the continued use of document requests and requests for admissions traditionally used in connection with hearings conducted on the record

Mandatory technical conference. The Public Representative supports the principle of making the now-optional practice of holding technical conferences mandatory, but questions the assumption that the Postal Service will be able to guarantee ongoing availability for the length of time indicated in the pro forma schedule. Committing to attendance for up to 10 days is also likely to pose some difficulty for participants. The objective of providing a guaranteed, uninterrupted period of availability is admirable, but consideration should be given to recognizing the need for some leeway.

Limits on interrogatories. Proposed section 3001.87 imposes a numerical limit on interrogatories. While the preamble makes clear this limit is part of the balance the Commission is striking to expedite N-Cases (and supplementing with features like pre-filing discovery opportunities and mandatory technical conferences), the source of the limit is not identified, nor is there an explanation of why 25 (not counting logically and factually subsumed subparts) was chosen over some other number. However, it seems that this limit (and the treatment of related subparts) track Rule 33 of the Federal Rules of Civil Procedure.

If expedition of N-Cases is to be achieved, it seems that numerical limits on interrogatories directed to the Postal Service are inevitable, notwithstanding legitimate concerns about the difficulty of capturing the qualitative aspects of a case in such a finite fashion. Assuming that the proposed limit is adopted, two points should be considered. One is clarifying that this limit would not apply to the Postal Service. (This point does not seem to be made in the preamble or the text of the proposed rules, but is there by implication.) The Postal Service is in the unique status of being the proponent of a request for an advisory opinion in N-Cases. In this capacity, it bears the burden of proof, so deserves greater leeway. In the interest of expedition, the Commission may find some other limit is appropriate, perhaps applied by witness.

Second, the allowance of “unlimited” subparts (subject to certain standards) comports with practice under the aforementioned federal rule, but has two important implications. One is the inadvertent introduction of unrelated subparts, if not patent abuse. The other is that requests for admission and production of documents, which traditionally have been a sleepy area of N-Case practice, may take on new importance.

The possibilities attendant to unrestricted subparts suggests that the Commission should make clear that decisions in these areas are within its sole discretion. Moreover, it would be useful to know if the Commission expects to address such matters on its own motion or only if brought to its attention by motion of a participant. Formalizing these points in the text of the rules should minimize the need to make rulings under the pressure of a ticking clock. If the Commission elects not to do so, it would be useful if

there were a discussion in the preamble addressing how the Commission intends to handle non-compliance and the possibility of a “spillover” increase in requests for admissions and documents. Special rules, if adopted as supplemental to Subpart D rules in a particular N-Case proceeding, are also a vehicle for addressing these matters.

Requests for production of documents and admissions. A reference in a bulleted item in the preamble to “the *continued* use of document requests and requests for admissions traditionally used in connection with hearings conducted on the record” indicates the Commission views the retention of these practices as an important part of a due process tradeoff for the limit on interrogatories.⁹ The Commission’s transfer of the provisions from Subpart A to Subpart D, with several changes tailored to revised N-Case procedures, adds to this impression.¹⁰

Before addressing specific revisions, several points warrant discussion. One is the “traditional use” of requests for production of documents and admissions in hearings at the Commission. Another is whether these discovery tools should “count” to any major extent in establishing a limit on interrogatories. Still another is the reference, and perhaps conflation, of “documents and things” — the traditional scope of existing section 3001.27 — with “documents and information” for purposes of proposed section 3001.88.

Requests for admission and for production of documents or things for the purpose of copying or inspection have been “on the books” at the Commission for years. They are patterned after the federal rules of civil procedure, where they have been in place in essentially identical form since the mid-to-late 1930s. Their adoption predates photocopying machines, facsimile machines, computers and email, among other tools of modern office life.

⁹ See 78 FR 35815 (emphasis supplied).

¹⁰ The caption of proposed section 3001. 88 is no longer “Requests for production of documents or things for purpose of discovery,” as it is in section 3001.27, but simply “Production of documents.” See proposed rule 3001.88 at 78 FR 35824. Notwithstanding this change, the text of the rule continues to refer to “or things.” See 3001.88(a)(1) at 38 FR 35824. Although a section caption is not dispositive on the scope of section text, clarification would be useful.

These discovery tools (located in sections 3001.27 and 3001.28 of the general rules of applicability) have seen relatively little use at the Commission. (However, requests for admissions (and denials) are part of the standard pleading format in complaint proceedings). Instead, for a number of reasons, they have grown quite rusty. In fact, setting aside some confusion stemming from data and information requests in *interrogatories*, requests for production of documents for inspection or copying in Commission proceedings are largely a relic of bygone days, before the advent of photocopying machines and computers (large and small), or simply inapplicable, as the Postal Service is not in possession of a relevant document or thing.”¹¹ This could change at some point, but it is more likely that “traditional” document requests and requests for admission will remain dormant. This cautions against identifying these tools as a justification for limiting the number of interrogatories, at a minimum.

At the same time, it is true that even as rules 27 and 28 have slumbered, interrogatories with attendant requests for data and information directed to the Postal Service for seem to have grown over the years ... and are problematic for several reasons. For one thing, the Postal Service may prepare a “document” or electronic spreadsheet in response. (Hence, the potential for confusion with the “production of documents” rule.) However, an interrogatory-based request for data and information was not originally intended to be within the reach of rule 27, as that rule clearly contemplates a pre-existing tangible item (be it a document or thing). But the development of large databases within the sole custody of the Postal Service — and the Postal Service’s ability to “create” many different documents from that data base — has blurred these distinctions.

In terms of the implications for N-Case discovery, a “traditional” request for production of a document or thing under the Commission’s existing rule should pose few problems. Consider, this example (assuming relevance and materiality): if a participant requests that the Postal Service allow inspection of a statue of Benjamin Franklin within its custody, the Postal Service should allow the participant access to

¹¹ Requests for production of documents or things for purposes of inspection still have considerable currency in other matters, such as art provenance investigations and patent cases.

Postal Service premises to inspect the statue on reasonable terms, such as during standard office hours and in the presence of a Postal Service employee. Similarly, if there is a relevant and material request for production of a rare letter signed by Benjamin Franklin or correspondence from Oregon Secretary of State Kate Brown to the Postmaster General within the Postal Service's custody, the Postal Service should, at a minimum, allow inspection under reasonable conditions. Copying, at least with respect to the Franklin letter, would be subject to preservation and security considerations. However, as a practical matter, the Postal Service might just email a copy of the Brown letter to requesting counsel, with other followup or formalities if needed for purposes of the record.

However, the Commission does not seem to be concerned about the situations just mentioned. Instead, its interest seems to lie in those chameleon-like *interrogatory* requests directed to the Postal Service that result in "creation of a document" by manipulating existing data and information sets. (Again, the creation of a document is not within the original intent of rule 27. That rule assumes the pre-existence of a document.)

One view is that because the Postal Service is the custodian of the data and information (and perhaps because the development and maintenance of large databases have been financed by mail users' rates and fees), participants other than the Postal Service should be allowed to make reasonable requests for manipulation of data in a form the Postal Service might not necessarily need to prepare for own its requirements — or not have to prepare for its own needs except in a custom "on demand" application. In fact, the ability to "push a button" at will may mean that an entity could blissfully evade legitimate discovery simply by maintaining large data sets, but never creating reports ("documents") that could be discovered.

In terms of the proposed rules, the Commission seems to intend to place data and information requests attendant to interrogatories *in the same section* as the conceptually *different* requests for production of a document for purposes of copying and inspection. The Public Representative opposes combining these inherently

different types of requests. It suggest addressing these “hybrids” in a new, separate section (with cross-references as needed), rather than placing them in proposed section 3001.87 (which would be the logical parallel to existing rules) or combining them with traditional requests for production of documents in proposed section 3001.88. This separate section would note that “hybrids” are not subject to the numerical limit on interrogatories.

In addition to the point raised above, the Commission, having combined the two types of requests, then states: “Requests for production of documents or information are appropriate for obtaining data actually in existence at the time of the request. Participants [presumably including the Postal Service in N-Cases] are not required to respond to requests for data by providing data that would have to be created or projected from existing data.” 78 FR 35817. “Original” rule 27 never required a participant to create a document, but given the proposed combination of the two types of requests, it appears the Postal Service would be excused from providing responses to data requests that have been found to be legitimate in the past.

The Public Representative does not support an outright ban on these types of requests, as the preamble indicates is the intention; instead, she suggests that their role in discovery be addressed outside the scope of this proceeding. Moreover, a reading of the proposed rule reveals some inconsistencies. (For example, the words “and information” referred to in the preamble do not appear in the text of proposed section 3001.88.) Instead of the reflecting the change discussed in the preamble, the text of this portion of the proposed rule is identical to existing rule 3001.27 in terms of covered matters (documents and “things” or “items”).

It seems there will continue to be circumstances where the past practice of allowing a participant to seek data and information from the Postal Service should continue. An outright ban seems contrary to the public interest, especially when the Postal Service is the sole custodian of vast data and information. Instead, safeguards to avoid undue burden should be explored.

In essence, a large part of the problem with data and information requests attendant to interrogatories is that modern technology has blurred the roles of rules 27 and 28. This is a problem courts and other agencies are also facing. More discussion is needed before a ban is imposed.

In conclusion, at a minimum, the Commission should reconsider “conflating” the two very different types of requests in one rule. A separate rule for interrogatory requests that seek production of data or information should be developed. More importantly, the issue of interrogatory requests that require the Postal Service (or another participant) to create a document is complicated. The preamble and the text of the proposed rule are inconsistent in some respects and do not provide sufficient guidance to participants. Additional consideration needs be given to the formulation of these rules. And, the use of special rules might suffice while resolution is being pursued.

Other issues. Aside from the points raised above, the main revision of interest in proposed rule 3001.88 is the Commission’s exclusion of the Postal Service from those who may request a document or thing.¹² It is not clear why the Commission excludes the Postal Service, unless the intent is that the rules of general applicability could come into play for Postal Service-initiated requests for admissions and production of documents. The Public Representative supports allowing the Postal Service to make requests for production (as it appears to have the right to do under basic notions of due process and the rules of general applicability.)

Unlimited requests. Requests for admissions and for production of documents are not limited under the proposed rules. The preceding discussion shows why, under the traditional interpretation of rules 27 and 28, the absence of a limit on the use of these two tools would not seem to provide participants with any special advantage or pose any difficulty for the Postal Service. Instead, the Commission’s exclusion of these

¹² The Postal Service is a “participant,” but obviously would not serve a request on itself. The general reference to “any participant” in the first sentence of rule 3001.88 (a)(1) appears to be an unintended result to editing the original rule. This also occurs in other proposed rules, but is not of any material consequence.

two tools from the numerical limit on interrogatories *seems* to provide some relief for participants, but the stated intention to foreclose requests for creation of data (discussed above) means this relief may be ephemeral, and the scope of discovery under the proposed rules far more constricted than it appears at first glance. As stated above, the Public Representative supports clarification of the Commission's intent and review of the use of interrogatories with attendant data and information requests outside this rulemaking.

XI. Seventh Bulleted Item

Revised procedures for prompter access to non-public materials

The preamble to the proposed rules states that in comments filed in response to the Advance Notice, the APWU expressed concern about having sufficient time to gain access to confidential material period in an expedited N-Case scenario. 78 FR 35818. The Commission agrees with APWU that expedition of N-Cases procedures makes it imperative that participants do not needlessly experience interim delays in obtaining access to confidential material. The Commission also points to some options available under existing practice. *Id.* However, the Commission states that it intends to defer addressing this matter due to broader implications. *Id.*

The Public Representative appreciates APWU's concern and supports the Commission's decision to address resolution of that concern outside of this rulemaking. The Public Representative also suggests that in the event an N-Case is filed before the access question is fully resolve, the Commission consider adoption of a special rule developed with the cooperation of the Postal Service and other participants.

XII. Eighth and Ninth Bulleted Items

The expedited filing of rebuttal and surrebuttal testimony, if any

A process by which participants elect to file rebuttal testimony and a restriction on rebuttal cases that limits the scope of such cases to material issues relevant to the specific proposal made by the Postal Service in its advisory opinion request

This portion of the Comments addresses the scope limitation before addressing filing issues.

First, a limitation on the scope of presentations seems a necessary and crucial component of the Commission's plan to issue timely advisory opinions in N-Cases. The questions, then, are whether a limitation is consistent with section 3661 and related APA requirements and how a limitation will be interpreted and applied.

Section 3661 requires the Commission to render an opinion "on the Postal Service's request," so the stated scope limitation seems to satisfy the 3661 test. Section 3661 also invokes APA hearing procedures for consideration of a service change request. The incorporation of APA requirements means a participant has the right, among other things, to present a "direct case" to the agency. The APA applies to a large number of agencies and several types of proceedings, so it is incumbent upon agencies to apply the reference to "direct case" to the specific circumstances of the proceeding at hand. In N-Cases, the proceeding, as established above, is defined by statute: section 3661 says it is "on the Postal Service's proposal," as a "change" in the nature of service. This seems to mean that the scope of the proceeding is the status quo and the Postal Service's proposed change to the status quo.

A conclusion that comports with law and common sense is that with respect to section 3661 proceedings, the "direct case" the APA refers to as a participant's right in an agency proceeding does not, in the context of a 3661 proceeding, mean a case presenting significant or wholesale alternatives to a well-defined "Postal Service proposal to effect a nationwide or substantially nationwide change in service." Instead, Congress, in drafting 3661, can fairly be seen as:

- delegating to an expert Commission the responsibility for assessing, in Congress's stead, the consistency of a proposed nationwide change in service with policies of the Act;
- importing a reference to the "trial type proceedings" of the APA to ensure that support for the change would be subject to substantiation through cross-examination, and not anecdotal or inconsequential; and

- allowing public input to the Commission's decision, in line with APA options, with respect to the consistency of the proposed change with policies of the Act.

It seems logical that the opportunity for input means that interested persons may explore development of the Postal Service's to some degree and suggest *some* modifications to the original proposal, but not a significant or wholesale replacement.

Notice of intent to file rebuttal testimony. The Public Representative supports requiring participants to inform the Commission of their intent to file rebuttal testimony, and suggests the Commission go several steps further. First, the use of "if any" in section 3001.90(c) limits the scope of this provision solely to notices from those who are planning to file rebuttal testimony. To foster certainty and avoid concern that there might be multiple participants filing late notices of intent with respect to rebuttal testimony, the Public Representative suggests expanding the coverage of the notice extend to participants who do *not* intent to file rebuttal or surrebuttal testimony. This approach has been used successfully in other Commission proceedings.

Next, the Public Representative suggests, with respect to notices of intent to file rebuttal testimony, requiring all participants filing such notices to include the following information in the notice:

- the number of pieces of testimony (clarifying that "testimony" may be more than one);
- the subject matter of the testimony;
- whether the testimony will be accompanied by supporting library references or exhibits, to the extent known; and
- name and position/title of the witness; and
- confirmation of witness availability.

The Commission may be interested in other things, as well, such as length of testimony in pages (or best estimate), as the proposed rules do not establish a page or word limit for testimony. (Nor does the Public Representative propose such limits.)

Given the suggested expansion of information in the Notice of Intent to File, revising the rule to encourage participants to use a standard form for this purpose should also be considered. Use of a standard form would allow the Commission and others to quickly assess the broad outlines of the rebuttal testimony and, as participants should know most of these things already, not impose an undue burden. A sample standard form is provided as Attachment C.

Requiring a showing of exceptional circumstances for the presentation of surrebuttal testimony. The Public Representative supports the Commission's interest in requiring a motion in support of surrebuttal testimony, but requiring an affirmative showing of exceptional circumstances may impose undue constraints, and therefore run afoul of due process. This is because a participant offering surrebuttal testimony presumably deems it essential to his or her case.

Moreover, as a practical matter, there is typically a considerable amount of work entailed in preparing testimony, so there is little incentive to file frivolous testimony.

At the same time, the Commission's interest in curbing needless or redundant testimony is understandable. It seems the information that must be provided under proposed section 3001.91(b), apart from the showing of exceptional circumstances, would suffice for a Commission decision on whether to grant the motion. In addition, under the revised procedures, the Postal Service is likely to have the most interest in filing surrebuttal testimony. The rule as proposed imposes additional burdens on prosecution of its case.

XIII. Tenth Bulleted Item

The elimination, in most cases, of field hearings

Field hearings in N-Cases have been a rare exception, not the rule.¹³ Field hearings not only raise due process concerns, but take considerable time to arrange. The latter feature, on its own, would impair the Commission's ability to achieve its goal of issuing an advisory opinion within 90 days, so the Commission's policy is consistent with fulfilling its section 3661 respondents.

The proposed rules appear to address the Commission's intended policy by indirection, as the policy is not expressly stated. If the Commission retains this approach, an explanation of the policy should be included in the preamble

XIV. Eleventh Bulleted Item

Revised hearing procedures providing for back-to-back hearings for the Postal Service's direct case, rebuttal testimony, if any, and surrebuttal testimony, if any

Hearings. Serial hearings on the Postal Service's testimony are likely to tax the resources of the Postal Service, the Commission, and all other participants. The Public Representative defers to the Commission and the Postal Service on the advisability of this provision, as they stand to be most affected by its introduction, especially in terms of insuring availability.

XV. Twelfth Bulleted Item

The implementation on a case-by-case basis of limitations on cross-examination to factual issues relevant to the Postal Service's proposal

This approach seems unobjectionable, assuming questions about the status quo are allowed and questions about policy decisions are not foreclosed.

XVI. Thirteenth Bulleted Item

A limitation on the length of initial and reply briefs and the adoption of an expedited schedule for filing such briefs

¹³ Field hearings were held in Docket No. N2010-1.

Word limits. Proposed section 3001.93 changes nothing with respect to the contents of initial and reply briefs set out in existing section 3001.34(b), but deadlines for filing, relative to the existing rules, are revised and word limits are introduced. With respect to the latter, proposed section 3001.93(c) limits initial and reply briefs to 14,000 words and 7,000 words, respectively. The Second Circuit has include identical limits, but present them as an option to page limits.¹⁴

The Public Representative does not oppose imposition of word (or page) limits, but — as with the numerical limit on interrogatories — encourages the Commission to excuse the Postal Service from adhering to these limits. It is consistent with the interests of the general public to allow the Postal Service, as proponent of the proposed change, to be allowed to respond to the extent it sees fit.

Comments in lieu of briefs. Proposed section 3001.93 appears to foreclose a participant from filing, at the close of the public stage of the proceeding, a document that is less formal or less extensive than a legal brief. Rule 3001.93, for example, requires inclusion of a subject index with page references, and a list of all cases and authorities relied upon, arranged alphabetically, with references to the pages where the citation appears. 78 FR 35826.

If the Commission's proposal to eliminate limited participator status is adopted, persons who no longer have that option might decide to intervene, but not be conversant with legal briefing. However, they have no option for communicating their position to the Commission other than through the mechanism of the legal brief. This includes fulfilling the "technical requirements" in section 3001.93 (b). Moreover, given time constraints, a full participant might want (or need) to do prepare a filing less comprehensive and detailed than a brief.

Given these possibilities, the Public Representative suggests (regardless of the fate of the limited participator proposal) that the Commission allow, as a recognized

¹⁴ See Fed. R. App. P 32(7) providing that a principal brief is not to exceed 30 pages or reply brief 15 pages, unless a principal brief contains no more than 14,000 words and a reply brief is acceptable if it contains no more than half of the type volume of a principal brief. This rule requires a certificate of compliance.

alternative to briefs, the option of Comments in Lieu of Brief for any intervenor. The Commission could make clear that points or positions raised in this alternative would have to be supported, and would have to address matters in § 3001.93(b)(2) and §3001.93(b)(3) relating, respectively, to the participant's viewpoint on the case and a clear statement of his or her position on the request. Comments in Lieu of Brief would not need to address matters referred to in §3001.93(b)(1), §3001.93(b)(4) and §3001.93(b)(5), or address them only to the extent possible, especially with respect to "precise references to the record."

XVII. Fourteenth Bulleted Item

The adoption of a policy of issuing advisory opinions that are targeted more precisely to the Postal Service's proposals and, when appropriate, instituting special studies that explore related subjects.

The first part of this policy succinctly expresses the task that the Congress delegated to the Congress upon enactment of PRA, so is fully consistent with section 3661. Section 3661 speaks to a hearing "on the Postal Service's proposal." Formal adoption of a policy to that effect is consistent with the interests of the general public.

At the same time, this policy should not foreclose participants from identifying alternatives or asking whether the Postal Service considered alternatives. The companion provision for special studies or public inquiries identifies a path for further consideration, without delaying action on an immediate request.

XVIII. A Perspective on Retroactive Application of Selected Proposed Rules

In assessing the potential impact of the proposed rule, the undersigned took a retroactive look at the Public Representative's filing in Docket No. 2010-1, Six-Day to Five-Day Street Delivery and Related Service Changes.

To determine scope, as a general matter, the following analysis might pertain:

- the Postal Service's filing established the scope of the case as the status quo (six-day delivery) and five-day delivery, with "days of delivery" the main benchmark for decisions about scope;
- participants' proposals sponsoring either more days of delivery (seven days) *as the rule* or fewer (four or less) would clearly have been outside the scope of the proceeding;
- however, as the status quo is always "on the table," participants' proposal to maintain the status quo are, as a matter of right, within the scope of the proceeding.

Under this analysis, it can be seen that a participant interested in pursuing major alternatives has no obvious avenue, within the proposed set of rules, for bringing his or her alternative to the attention of the Commission in the form of testimony.¹⁵ However, although not presently contemplated under the Commission's proposal, the briefing stage and the Commission's "special studies" option provide an avenue for participants to present these ideas. In particular, the Commission could allow a participant, on the day scheduled for reply briefs, to file "Comments in Lieu of Brief" proposing a special study or public inquiry.

Returning to Docket No. N2010-1, had the proposed Subpart D rules been in effect, the Public Representative would have been engaged in the pre-filing stage and *ex parte* prohibitions would have attached. It is even possible, given the objectives of the pre-filing stage, that the Postal Service might have revised its proposal by offering to pick up and deliver First-Class mail on Sundays and holidays during major election periods or employ some other approach, such as formalizing and guaranteeing unofficial steps it has undertaken during election periods.¹⁶ Similarly, some accommodation might have been for rural delivery, either in connection with or independent of prescription medicine.

¹⁵ Some agencies might allow a "motion for enlargement of the scope of the proceeding" to accommodate this interest.

¹⁶ These options were not discussed with the Postal Service in Docket No. N2010-1, nor suggested by the witness sponsored by the Public Representative addressing Vote by Mail.

In the event the Postal Service did not revise the proposal, the Public Representative, pursuant to the pro forma schedule in the proposed rules, would have filed a notice (on Day 37) “confirming” intent to file what the proposed rule identifies as rebuttal testimony. The two pieces of testimony would then have been filed on Day 42.

Both pieces of testimony addressed the adequacy of the Postal Service’s support for the proposed change *from the status quo*. One addressed rural mail users; the other Postal Service-dependent Vote by Mail programs. As neither piece of sponsored testimony proposed that the Postal Service’s request be *expanded* to cover Sunday delivery to rural areas or to *add Sunday delivery or multiple deliveries* on certain days during election periods, it appears they easily would have passed muster as rebuttal testimony. However, it is not completely clear whether, if the “Vote-by-Mail” witness had included a suggestion about Sunday pickup and delivery during election periods, this portion of the testimony would be still be legitimate rebuttal testimony. It might be seen as a relatively minor modification, as the number of days involved (with days as the benchmark) might be considered relatively small. If not, this portion of the testimony ostensibly would have been subject to a motion to strike.

Under the latter scenario, if this portion of the testimony is stricken, the witness *might* be able to suggest election-period delivery options as the basis for a special study or public inquiry. A question arises, though, about how and whether this suggestion could be made under the proposed rules. If explicit allowance is made in the rules for “Comments in Lieu of Brief,” the Vote by Mail witness might have had an opportunity to bring the proposal to the attention of the Commission and others via that route, even if the proposal was stricken from testimony. It is also possible, in the interests of efficient administration, that the proposal would have remained in the testimony, with the understanding that it had related only to a special study.

It also appears that casting consideration of the Postal Service’s proposals, at least with respect to other participants, largely in terms of “rebuttal” postpones any active involvement of a participant that supports the Postal Service’s proposal to the

surrebuttal stage of the proceeding. And, in the event no rebuttal testimony is filed, a supporter's involvement is limited to the briefing stage.

It is not clear if the Commission intended this result, as supporters of a proposed service change also have the right to their say under the APA. As the Postal Service would not need to conduct cross-examination on a supporter's case, it does not appear that any explicit provision for direct testimony is needed. However, allowing this supporter to file Comments in Lieu of a Brief, without the formalities attendant to surrebuttal testimony or a legal brief, might be a pragmatic and APA-compliant avenue for getting supporting views on the record.

The Public Representative looks forward to continued dialogue on proposed Subpart D.

Respectfully submitted,

s/Patricia A. Gallagher

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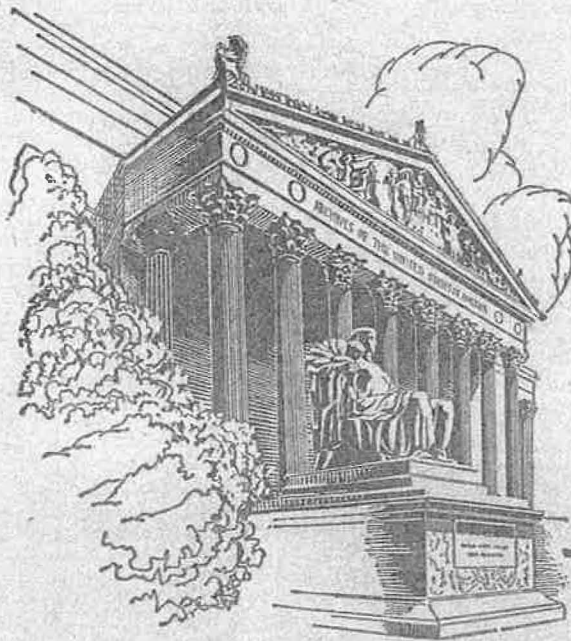
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PART II

POSTAL RATE COMMISSION

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Rules of Practice and Procedure



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Title 39—POSTAL SERVICE

Chapter III—Postal Rate Commission

PART 3001—RULES OF PRACTICE AND PROCEDURE

The Postal Rate Commission promulgates this Part 3001 as the Postal Rate Commission's rules of practice and procedure governing the conduct of proceedings before the Commission in matters concerning rates of postage, fees for postal services, mail classification schedules and changes in such schedules, changes in the nature of postal services generally affecting service on a nationwide or substantially nationwide basis, complaints as to rates and services of such nature.

The Postal Reorganization Act, as well as the legislative history and matters developed in pertinent hearings before committees of the House and Senate, including presentations to the Congress by the Postal Service concerning revenue objectives and imminent proposals for postal rate increases, point to the urgency of the immediate promulgation of Part 3001.

Notice and public procedure are not required by the Administrative Procedure Act as to rules of agency organization, procedure or practices. Furthermore, as to the rules here promulgated the Commission for good cause finds that notice and public procedure are impracticable, unnecessary, and contrary to the public interest.

This Part 3001 shall become effective upon its publication in the FEDERAL REGISTER.

Interested persons may submit written comments concerning these rules to the Postal Rate Commission, Washington, D.C. 20268.

By order of the Postal Rate Commission.

WILLIAM J. CROWLEY,
Chairman.

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AUTHORITY: The provisions of this Part 3001 issued under sec. 3603, 84 Stat. 759, 39 U.S.C. 3603.

Subpart A—Rules of General Applicability

§ 3001.1 The Commission and its offices.

(a) *The Commission.* The Postal Rate Commission is an independent establishment of the Executive Branch of the U.S. Government created by the Act. The Commission consists of five Commissioners appointed by the President one of whom is designated as Chairman by the President. Three members of the Commission constitute a quorum for the transaction of business, but all final acts of the Commission shall be by a vote of an absolute majority of the Commissioners.

(b) *The Chairman.* The Chairman has the administrative responsibility for assigning the business of the Commission to the other Commissioners and to the officers and employees of the Commission. He has the administrative duty to preside at the meetings and sessions of the Commission and to represent the Commission in matters specified by statute or executive order or as the Commission directs. The Commission will, in case of a vacancy in the office of the Chairman of the Commission, or in the absence or inability of the Chairman to serve, designate one of its members Acting Chairman to serve during the period of vacancy, absence or inability.

(c) *The Secretary.* The Secretary shall have custody of the Commission's seal, the minutes of all action taken by the Commission, its rules and regulations, its administrative and other orders, and records. All orders and other actions of the Commission shall be authenticated or signed by the Secretary or any such other person as may be authorized by the Commission.

(d) *The Staff.* The Staff consists of such accounting, economic, engineering, legal, and rate experts, and such other employees as the Commission, from time to time, shall find necessary.

(e) *Offices.* The offices of the Commission are in Washington, D.C. All communications to the Commission should be addressed to: Postal Rate Commission, Washington, DC 20268.

(f) *Hours.* The offices of the Commission will be open from 8:45 a.m. to 5:15 p.m. of each day except Saturdays, Sundays, and holidays, unless otherwise directed by Executive order or officially declared, with appropriate notice.

§ 3001.3 Scope of rules.

The rules of practice in this part are applicable to proceedings before the Postal Rate Commission under the Act, including those which involve a hearing on the record before the Commission or its designated presiding officer. They do not preclude the informal disposition of any matters coming before the Commission not required by statute to be determined upon notice and hearing.

§ 3001.4 Method of citing rules.

This part shall be referred to as the "rules of practice." Each section, paragraph, or subparagraph shall include only the numbers and letters to the right of the decimal point. For example, "3001.24 *Prehearing conferences*" shall be referred to as "section 24."

§ 3001.5 Definitions.

(a) "Act" means the Postal Reorganization Act (84 Stat. 719, Title 39, United States Code).

(b) "Postal Service" means the U.S. Postal Service established by the Act.

(c) "Commission" or "Commissioner" means, respectively, the Postal Rate Commission established by the Act or a member thereof.

(d) "Secretary" means the Secretary or the Acting Secretary of the Commission.

(e) "Presiding officer" means the Chairman of the Commission in proceedings conducted by the Commission en banc or the Commissioner or hearing examiner of the Commission designated to preside at hearings or conferences.

(f) "Person" means an individual, a partnership, corporation, trust, unincorporated association, or governmental agency.

(g) "Party" means the Postal Service, a complainant, or a person who has been permitted to intervene in a proceeding before the Commission.

(h) "Participant" means any party and the officer of the Commission who is designated to represent the interests of the general public.

(i) "Complainant" means a person or interested party who as permitted by section 3662 of the Act files a complaint with the Commission in the form and manner hereinafter prescribed.

(j) "Hearing" means a hearing under sections 556 and 557 of title 5, United States Code (80 Stat. 386), as provided by sections 3624, 3661, and 3662 of the Act.

(k) "Record" means the transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, which constitutes the exclusive record for decision.

(l) "Effective date" of an order or notice issued by the Commission or an officer thereof means the date of issuance unless otherwise specifically provided.

§ 3001.6 Appearances.

(a) *By whom.* An individual may appear in his own behalf; a member of a partnership may represent the partnership; and an officer may represent a corporation, trust, unincorporated association, or governmental agency. A person may be represented in a proceeding by an attorney at law admitted to practice and in good standing before the Supreme Court of the United States, the highest court of any State or Territory of the United States or the District of Columbia, or the Court of Appeals or the District Court for the District of Columbia.

(b) *Authority to act.* When an officer of any party or an attorney acting in a representative capacity appears in person or signs a paper filed with the Commission, his personal appearance or signature shall constitute a representation to the Commission that he is authorized to represent the particular party in whose behalf he acts. Any person appearing before or transacting business with the Commission in a representative capacity may be required by the Commission or the presiding officer to file evidence of his authority to act in such capacity.

(c) *Designation for service.* A person intending to appear before the Commission or its presiding officer in a representative capacity for a party in a proceeding shall file with the Commission a notice of appearance in the form prescribed by the Secretary unless the person is named in an initial filing of the party whom he represents as a person to whom communications from the Commission in regard to the filing are to be

addressed. Failure to file a notice required by this paragraph shall constitute a waiver of the right to service of documents.

(d) *Standards of conduct.* Individuals practicing before the Commission shall conform to the standards of ethical conduct required of practitioners in the courts of the United States.

(e) *Disqualification and suspension.* After hearing, the Commission may disqualify and deny, temporarily or permanently, the privilege of appearing and practicing before it in any way to any individual who is found not to possess the requisite qualifications, or to have engaged in unethical or improper professional conduct. Contumacious conduct at any hearing before the Commission or its presiding officer shall be ground for exclusion of any individual from such hearing and for summary suspension for the duration of the hearing by the Commission or the presiding officer.

(f) *Disqualification of former members and employees.*—(1) *Permanent.* No former Commissioner or employee, including a special Commission employee, shall act as agent or attorney before the Commission for anyone other than the United States in connection with any proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, or other particular matter involving a specific party or parties in which the United States is a party or has a direct and substantial interest and in which he participated personally and substantially through decision, approval, disapproval, recommendation, rendering of advice, investigation, or otherwise as a Commissioner or employee.

(2) *Temporary.* Within 1 year after termination of employment with the Commission, no former Commissioner or employee, including a special Commission employee, shall appear personally before the Commission on behalf of any person other than the United States in any Commission proceeding or matter in which the United States is a party or has a direct and substantial interest and which was under his official responsibility at any time within 1 year preceding termination of such responsibility. The term "official responsibility" means the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and either personally or through subordinates, to approve, disapprove, or otherwise direct Government action.

§ 3001.7 Ex parte communications.

(a) *Prohibition.* To avoid the possibility or appearance of impropriety or of prejudice to the public interest and persons involved in proceedings pending before the Commission, no person who is a party to any on-the-record proceeding or his counsel, agent, or other person acting on his behalf, nor any interceder, shall volunteer or submit to any member of the Commission or member of his personal staff, to the presiding officer, or to any employee participating in the decision in such proceeding, any ex parte

off-the-record communication regarding any matter at issue in the on-the-record proceeding, except as authorized by law; and no Commissioner, member of his personal staff, presiding officer, or employee participating in the decision in such proceeding, shall request or entertain any such communication. For the purposes of this section, the term "on-the-record proceeding" means a proceeding noticed pursuant to § 3001.17. The prohibitions of this paragraph shall apply from the date of issuance of such notice.

(b) *Placement in public file.* All written ex parte communications prohibited by paragraph (a) of this section shall be delivered to the Secretary of the Commission for placement in a public file associated with the case but separate from the record material upon which the Commission may rely in reaching its decision.

(c) *Offer of communications.* A Commissioner, member of his immediate staff, presiding officer or employee participating in the decision in any on-the-record proceeding who receives an offer of any communication concerning any matter at issue in such proceeding shall decline to listen to such communication and explain that the matter is pending for determination. If unsuccessful in preventing such communication, the recipient thereof shall advise the communicator that he will not consider the communication and shall promptly and fully inform the Commission in writing of the substance of and the circumstances attending the communication, so that the Commission will be able to take appropriate action. Such written report shall be included in the file maintained by the Secretary pursuant to paragraph (b) of this section.

(d) *Opportunity to rebut.* Requests for an opportunity to rebut, on the record, any facts or contentions contained in an ex parte communication which the Secretary has associated with the record may be filed in writing with the Commission. The Commission will grant such requests only where it determines that the dictates of fairness so require. Generally, in lieu of actually receiving rebuttal material, the Commission will direct that the alleged factual assertion and the proposed rebuttal be disregarded in arriving at a decision.

§ 3001.8 No participation by investigative or prosecuting officers.

In any proceeding noticed pursuant to § 3001.17, no officer, employee or agent of the Commission who appears in the hearing in a proceeding before the Commission as an attorney or witness or who actively participates in the preparation of evidence or argument presented by such persons, shall participate or advise as to the intermediate decision or Commission decision in that proceeding except as a witness or counsel in public proceedings.

§ 3001.9 Filing of documents.

(a) *Filing with the Commission.* The filing of any written document required by these rules or any applicable statute,

rule, regulation or order of the Commission, or by direction of the presiding officer shall be made by filing with the Office of the Secretary, Postal Rate Commission, Washington, DC 20268, during normal business hours on a date no later than that specified for such filing. Documents received after the close of normal business hours or on a Saturday, Sunday, or holiday, shall be deemed to be filed on the next regular business day.

(b) *Acceptance for filing.* Only such documents as conform to the requirements of this part and any other applicable rule, regulation or order of the Commission shall be accepted for filing. Unacceptable filings will be rejected by the Secretary and will not be included in the file in the proceeding involved. The Secretary shall notify the sender of any unacceptable document and all parties to the proceeding in which such document was tendered that such document was rejected. Acceptance for filing shall not waive any failure to comply with the rules, and such failure may be cause for subsequently striking all or any part of any document.

§ 3001.10 Form and number of copies of documents.

(a) *Typewritten.* If not printed, documents filed with the Commission shall be typewritten on paper of letter size, 8 to 8½ inches wide by 10½ to 11 inches long, with left-handed margin not less than 1½ inches wide and other margins not less than 1 inch, except that tables, charts or special documents attached thereto may be larger if required, provided that they are folded to the size of the document to which they are attached. (The impression shall be on only one side of the paper unless there are more than 10 pages.) The text shall be double-spaced except that footnotes and quotations of more than a few lines may be single spaced. Type not smaller than elite shall be used. If the document is bound, it shall be bound on the left side. Copies of documents for filing and service may be reproduced by any duplicating process that produces clear and legible copies.

(b) *Printed.* Printed documents filed with the Commission shall, insofar as practicable, not be less than 10-point type adequately leaded, on unglazed paper cut or folded to a size of 8 to 8½ inches wide and 10½ to 11 inches long, with inside margin not less than 1 inch wide, and with double-leaded text and single-leaded, indented quotations.

(c) *Number of copies.* Except for correspondence or as otherwise may be required by the Commission, the Secretary, or the presiding officer in any proceeding, an original and 14 fully conformed copies of each document required or permitted to be filed under this part shall be filed with the Secretary. The copies need not be signed but shall show the full name of the person signing the original document and the certificate of service attached thereto.

§ 3001.11 General contents of documents.

(a) *Caption and title.* The caption of a document filed with the Commission in

any proceeding shall clearly show the docket designation and title of the proceeding before the Commission. The title of such document shall show the name of the person in whose behalf the filing is made and a brief description of the document or the nature of the relief sought therein (i.e., motion for extension, brief on exceptions, complaint, petition to intervene, answer to complaint). If the document is filed on behalf of more than one person, a single name only need be included in the title.

(b) *Designation of person to receive service.* The first page of the initial document filed by any person in any proceeding shall state the name and full post office address of the person or persons who may be served with any documents relating to the proceeding.

(c) *Contents.* In the event there is no rule, regulation or order of the Commission which specifically prescribes the contents of any document to be filed, such document shall contain a proper identification of the parties concerned and a concise but complete statement of the relief sought and of the facts and citations of authority and precedent relied upon.

(d) *Improper matter.* Defamatory, scurrilous, or unethical matter shall not be included in any document filed with the Commission.

(e) *Subscription.* The original of any document filed with the Commission shall be signed in ink by the participant filing the same or by an authorized officer, employee, attorney or other representative, and all other copies of such document filed with the Commission and served on the participants in any proceeding shall be fully conformed thereto. The signature of any person subscribing any document filed with the Commission constitutes a certification that he has read the document being subscribed and filed; that he knows the contents thereof; that if executed in any representative capacity, the document has been subscribed and executed in the capacity specified in the document with full power and authority so to do; that to the best of his knowledge, information and belief every statement contained in the document is true and no such statements are misleading; and that such document is not filed for purposes of delay.

(f) *Table of contents.* All documents other than briefs filed with the Commission consisting of 20 or more pages shall contain a subject-index of the matter in such document with page references.

(g) *Certificate of service.* There shall be attached to the original of each document filed with the Commission a certificate of service signed in ink showing service on all participants in a proceeding as prescribed by § 3001.12. All other copies filed and served shall be fully conformed thereto.

§ 3001.12 Service of documents.

(a) *Service by the Commission.* Notices, orders, and other similar documents issued by the Commission or presiding officer shall be served by the Secretary upon the participants in the proceeding individually or by such groups

as may be directed by the Commission or presiding officer.

(b) *Service by the parties.* Every document filed by any person with the Commission in a proceeding shall be served by the person filing such document upon the participants in the proceeding individually or by such groups as may be directed by the Commission or presiding officer.

(c) *Limitation on extent of service.* To avoid the imposition of an unreasonable burden upon participants, the Commission or the presiding officer may, by appropriate order, limit service to service upon participants intending to actively participate in the hearing, or upon a person or persons designated for properly representative groups, or by requiring the making of documents available for convenient public inspection, or by any combination of such methods.

(d) *Service list.* The Secretary shall maintain a current service list in each proceeding which shall include the participants in that proceeding and the person or persons designated for service of documents by each party with the address designated in the party's initial pleading in such proceeding or a notice of appearance as provided in § 3001.6(c); provided, however, the Secretary is not required to include on such list more than two designated representatives for any party to the proceeding. The service list shall show the participants actively participating in the hearing and representative groups established pursuant to paragraph (c) of this section. Service on the persons, active participants or groups on the Secretary's service list in any proceeding, as directed by the Commission or hearing officer, shall be deemed service in compliance with the requirements of this section.

(e) *Method of service.* Service may be made by first class mail or personal delivery to the address shown for the persons designated on the Secretary's service list. Service upon the Postal Service shall be made by delivering or mailing the same to the Office of the Assistant General Counsel, Postal Rates and Mail Classifications Divisions, U.S. Postal Service, Washington, DC 20260.

(f) *Date of service.* Whenever service is made by mail, the date of mailing shall be the date of service. Whenever service is made by personal delivery, the date of such delivery shall be the date of service.

(g) *Form of certificate of service.* The certificate of service shall show the name of the participant or his counsel making service, the date and place of service, and include the statement that "I hereby certify that I have this day served the foregoing document upon all participants of record in this proceeding in accordance with section 12 of the rules of practice."

§ 3001.13 Docket and hearing calendar.

The Secretary shall maintain a docket of all proceedings, and each proceeding as initiated shall be assigned an appropriate designation. The Secretary shall maintain a hearing calendar of all proceedings which have been set for hearing, which proceedings shall be heard on the

date set in the hearing order, except that the Commission may for cause, with or without motion, at any time with due notice to the parties advance or postpone the date of hearing. The docket and hearing calendar shall be available for public inspection during the office hours of the Commission, insofar as consistent with the proper discharge of the Commission's duties.

§ 3001.14 Consolidation and separation of proceedings.

The Commission, with or without motion, may order proceedings involving related issues or facts to be consolidated for hearing of any or all matters in issue in such proceedings. The Commission may sever proceedings which have been consolidated, or order separate proceedings on any issue presented, if it appears that separate proceedings will be more convenient, expeditious, or otherwise appropriate.

§ 3001.15 Computation of time.

Except as otherwise provided by law, in computing any period of time prescribed or allowed by this part, or by any notice, order, rule or regulation of the Commission or a presiding officer, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included unless it is a Saturday, Sunday, or legal holiday for the Commission, in which event the period runs until the end of the next day which is neither a Saturday, Sunday, or holiday. A part-day holiday shall be considered as other days and not as a holiday.

§ 3001.16 Continuances and extensions of time.

Continuances of any proceeding or hearing and extensions of time for making any filing or performing any act required or allowed to be done within a specified time or by a specified date may be granted by the Commission or the presiding officer upon motion for good cause shown unless the time for performance or filing is limited by statute. Requests for extension of time shall be by written motion timely filed with the Commission stating the facts on which the application rests, except that after a hearing has convened, such requests shall be made by written or oral motion to the presiding officer. Requests for continuances or extensions of time may as a matter of discretion be acted upon without waiting for answers thereto.

§ 3001.17 Notice of proceeding.

(a) *When issued.* The Commission shall issue a notice of a proceeding to be determined on the record with an opportunity for any interested person to request a hearing whenever:

(1) The Postal Service files a formal request that the Commission submit a recommended decision on changes in postal rates or fees or establishing or changing the mail classification schedule;

(2) The Commission proposes on its own initiative to issue a recommended

decision on changes in the mail classification schedule;

(3) The Postal Service files a request with the Commission to issue an advisory opinion on a proposed change in the nature of postal services which will generally affect service on a nationwide or substantially nationwide basis;

(4) The Commission in the exercise of its discretion determines that an opportunity for hearing should be provided with regard to a complaint filed pursuant to Subpart E of this part; or

(5) The Commission in the exercise of its discretion determines to institute any other proceeding under the Act.

(b) *Publication and service of notice.* Each notice of proceeding shall be published in the FEDERAL REGISTER and served on the Postal Service, and the complainant in a complaint proceeding.

(c) *Contents of notice.* The notice of a proceeding shall include the following:

(1) The general nature of the proceeding involved in terms of the categories listed in paragraph (a) of this section;

(2) A reference to the legal authority under which the proceeding is to be conducted;

(3) A concise description of proposals for changes in rates or fees, proposals for the establishment of or changes in the mail classification schedule, or proposals for changes in the nature of postal services or, in the case of a complaint, an identification of the complainant and a concise description of the subject matter of the complaint;

(4) The date by which petitions for leave to intervene and requests for hearing must be filed; and

(5) Such other information as the Commission may desire to include.

§ 3001.18 Nature of proceedings.

(a) *Proceedings to be set for hearing.* In any case noticed for a proceeding to be determined on the record pursuant to § 3001.17, the Commission shall hold a public hearing if a hearing is requested by any party to the proceeding or if the Commission in the exercise of its discretion determines that a hearing is in the public interest. The Commission may give notice of its determination that a hearing shall be held in its original notice of the proceeding or in a subsequent notice issued pursuant to paragraph (b) of this section and § 3001.19.

(b) *Procedure in hearing cases.* In proceedings which are to be set for hearing, the Commission shall issue a notice of hearing or prehearing conference pursuant to § 3001.19. After the completion of the hearing, the Commission or the presiding officer shall receive such briefs and hear such oral argument as may be ordered by the Commission or the presiding officer pursuant to §§ 3001.34 to 3001.37, and the Commission shall then issue a recommended decision, advisory opinion, or public report, as appropriate, in accordance with the provisions of §§ 3001.38 to 3001.39.

(c) *Procedure in non-hearing cases.* In any case noticed for a proceeding to be determined on the record in which a

hearing is not requested by any party or ordered by the Commission, the Commission or the presiding officer shall issue a notice of the procedure to be followed with regard to the filing of briefs and oral argument, and a recommended decision, advisory opinion, or public report, as appropriate, shall then be issued pursuant to the provisions of §§ 3001.34 to 3001.39. The Commission or presiding officer may, if necessary or desirable, call procedural conferences by issuance of a notice pursuant to § 3001.19.

§ 3001.19 Notice of prehearing conference or hearing.

In any proceeding noticed for a proceeding on the record pursuant to § 3001.17, the Commission shall give due notice of any prehearing conference or hearing in the notice of proceeding by including therein the time and place of the conference or hearing or by subsequently issuing a notice of prehearing conference or hearing. Such notice of prehearing conference or hearing shall give the title and docket designation of the proceeding, a reference to the original notice of proceeding and the date of such notice, and the time and place of the conference or hearing and the designation of the presiding officer. Similar notice shall be issued of the time and place where a hearing will be reconvened unless announcement was made thereof by the presiding officer at the adjournment of an earlier session of the prehearing conference or hearing. Such notices shall be published in the FEDERAL REGISTER and served on all participants in the proceeding involved.

§ 3001.20 Formal interventions.

(a) *Who may intervene.* A petition for leave to intervene will be entertained in those cases that are noticed for a proceeding pursuant to § 3001.17 from any person claiming an interest of such nature that his intervention is necessary or appropriate to the administration of the Act.

(b) *Contents of petitions.* A petition to intervene shall clearly and concisely set forth the nature and extent of the petitioner's interest in the issues to be decided, including the classifications of postal service utilized by the petitioner giving rise to his interest in the proceeding, and the position of the petitioner with regard to the proposed changes in postal rates, fees, classifications, or services, or the subject matter of the complaint, as described in the notice of the proceeding. Such petition shall affirmatively state whether or not the petitioner requests a hearing or in lieu thereof, a conference, and whether or not the petitioner intends to actively participate in a hearing. Such petition shall also include on page one thereof the name and full mailing address of the person or persons who are to receive service of any documents relating to such proceeding.

(c) *Form and time of filing of petitions.* Petitions to intervene shall be filed no later than the date fixed for the filing of such petitions in any notice or order with respect to the proceeding issued by

the Commission or its Secretary, unless in extraordinary circumstances for good cause shown, the Commission authorizes a late filing. Petitions to intervene shall conform to the requirements of §§ 3001.9 to 3001.11 and shall be served on the Postal Service and the complainant in a complaint proceeding pursuant to § 3001.12.

(d) *Answers.* Answers to petitions to intervene may be filed by any party to a proceeding or any person who has filed a petition to intervene therein no later than 7 days after the petition to intervene is filed.

(e) *Action on petitions.* As soon as practicable after the expiration of the time for filing answers to petitions to intervene, the Commission shall rule on each petition to intervene and shall grant or deny such intervention or may, if found to be appropriate, authorize limited participation.

(f) *Effect of granting intervention.* A person permitted to intervene shall be a party to the proceeding, subject, however, to the right of the Commission or the presiding officer as specified in § 3001.24 to require two or more interveners having substantially like interests and positions to join together for purposes of service of documents, presenting evidence, making and arguing motions and objections, cross-examining witnesses, filing briefs, and presenting oral arguments to the Commission or presiding officer. No decision granting intervention to any person shall be deemed to constitute a decision that the intervening party has such an interest in the proceeding that he would be aggrieved by an ultimate decision or order of the Commission.

§ 3001.21 *Motions to the Commission.*

(a) *Scope and contents.* An application to the Commission for an order or ruling not otherwise specifically provided for in this part shall be by motion. Motions shall set forth with particularity the ruling or relief sought, the grounds and basis therefor, and the statutory or other authority relied upon, and shall be filed with the Commission and served pursuant to the provisions of §§ 3001.9 to 3001.12.

(b) *Answers.* Within 7 days after a motion is filed, or such other period as the Commission may fix, any party to the proceeding may file and serve an answer in support of or in opposition to the motion pursuant to §§ 3001.9 to 3001.12. Such answers shall state with particularity the position of the participant with regard to the ruling or relief requested in the motion and the grounds and basis and statutory or other authority relied upon. Unless the Commission otherwise provides, no reply to an answer or any further responsive document shall be filed.

§ 3001.22 *Requests for waiver.*

Upon request by motion, any requirement of any subpart of this Part 3001 may be waived in whole or in part to the extent permitted by law upon a showing that such waiver will not unduly prejudice the interests of other participants

and is consistent with the public interest and the Commission's expeditious discharge of its responsibilities under the Act. A request for waiver shall not be entertained unless it is timely filed so as to permit Commission disposition of the request prior to the date specified for the requirement for which waiver is requested. The pendency of a request for waiver does not justify or excuse any person from timely meeting the requirements of this part.

§ 3001.23 *Presiding officers.*

(a) *Authority delegated.* Presiding officers shall have the authority, within the Commission's powers and subject to its published rules, as follows:

(1) To regulate the course of the hearing, including the recessing, reconvening, and adjournment thereof, unless otherwise directed by the Commission, as provided in § 3001.16;

(2) To administer oaths and affirmations;

(3) To issue subpoenas authorized by law;

(4) To rule upon offers of proof and receive relevant evidence;

(5) To take or authorize that depositions be taken as provided in § 3001.33;

(6) To hold appropriate conferences before or during hearings and to rule on matters raised at such conferences including those specified in paragraph (d) of § 3001.24;

(7) To dispose of procedural requests or similar matters but not, before their initial or recommended decision, to dispose of motions made during hearings to dismiss proceedings or other motions which involve a final determination of the proceeding;

(8) Within their discretion, or upon direction of the Commission, to certify any question to the Commission for its consideration and disposition;

(9) To submit an initial or recommended decision in accordance with §§ 3001.38 and 3001.39; and

(10) To take any other action necessary or appropriate to the discharge of the duties vested in them, consistent with the statutory or other authorities under which the Commission functions and with the rules, regulations, and policies of the Commission.

(b) *Conduct of hearings.* It is the duty of the presiding officer to conduct a fair and impartial hearing and to maintain order. Any disregard by participants or counsel of his rulings on matters of order and procedure shall be noted on the record, and where he deems it necessary shall be made the subject of a special written report to the Commission. In the event that participants or counsel should be guilty of disrespectful, disorderly, or contumacious language or conduct in connection with any hearing, the presiding officer immediately may submit to the Commission his report thereon, together with his recommendations, and in his discretion, suspend the hearing.

(c) *Limitations.* Presiding officers shall perform no duties inconsistent with their duties and responsibilities as such. Except to the extent required for the disposition of ex parte matters as authorized

by law and by the rules of the Commission, no presiding officer shall, in any proceeding in which the Commission may so direct, or in any proceeding required by statute to be determined on the record after opportunity for hearing, consult any person on any matter in issue unless upon notice and opportunity for all participants to be heard.

(d) *Disqualification.* A presiding officer may withdraw from a proceeding when he deems himself disqualified, or he may be withdrawn by the Commission for good cause found after timely affidavits alleging personal bias or other disqualifications have been filed.

§ 3001.24 *Prehearing conferences.*

(a) *Initiation and purposes.* In any proceeding the Commission or the presiding officer may, with or without motion, upon due notice as to time and place, direct the participants in a proceeding to appear for a prehearing conference for the purposes of considering all possible ways of expediting the proceeding, including those in paragraph (d) of this section. It is the intent of the Commission to issue its recommended decision or advisory opinion on requests under sections 3622, 3623, and 3661 of the Act with the utmost practicable expedition. The Commission directs that these prehearing procedures shall be rigorously pursued by the presiding officer and all participants to that end.

(b) *Informal off-the-record procedures.* In order to make the prehearing conference as effective as possible, the presiding officer may, in his discretion, direct that conferences be held off the record at the beginning of a prehearing conference or at other appropriate times, without the presiding officer being present. Such informal off-the-record conferences shall be presided over by the Commission's officer designated to represent the interests of the general public or such other person as the participants may select. At such off-the-record conferences the participants shall be expected to reach agreement on those matters which will expedite the proceeding, including the matters specified in the notice of the prehearing conference, in the ruling of the presiding officer directing that the off-the-record conference be held and in paragraph (d) of this section. A report on the results of such off-the-record conference shall be made to the presiding officer on the record at a time specified by the presiding officer and he shall then determine the further prehearing procedures to be followed.

(c) *Required preparation and cooperation of all parties.* All participants in any proceeding before the Commission are required and expected to come to the prehearing conference fully prepared to discuss in detail and resolve all matters specified in paragraph (d) of this section, and notice of the prehearing conference, and such other notice or agenda as may have been issued by the Commission or the presiding officer. All participants are required and expected to cooperate fully at all stages of the proceeding to achieve these objectives, through thorough advance preparation for the

prehearing conference, including informal communications between the participants, requests for discovery and appropriate discovery procedures at the earliest possible time and no later than at the prehearing conference, and the commencement of preparation of evidence and cross-examination. The failure of any participant to appear at the prehearing conference or to raise any matters that could reasonably be anticipated and resolved at the prehearing conference shall not be permitted to unduly delay the progress of the proceeding and shall constitute a waiver of the rights of the participant with regard thereto, including all objections to the agreements reached, actions taken, or rulings issued by the presiding officer with regard thereto.

(d) *Matters to be pursued.* At the prehearing conference in any proceeding, the presiding officer and the participants shall consider and resolve the following matters:

(1) The definition and simplification of the issues including any appropriate explanation, clarification, or amendment of any proposal, filing, evidence, complaint or other pleading filed by any participant.

(2) Arrangement for timely completion of discovery from the Postal Service or any other participant with regard to information desired by any participant with regard to any issues in the proceeding or prior filings, evidence or pleadings of any participant.

(3) Agreement as to procedures for timely discovery with regard to any future evidentiary filings of any participant.

(4) Stipulations, admissions or concessions as to evidentiary facts, and agreements as to documentary matters, exhibits and matters of official notice, which will avoid unnecessary proof or dispute.

(5) Grouping parties with substantially like interests for purposes of presenting evidence, making and arguing motions and objections, cross-examining witnesses, filing briefs, and presenting oral argument to the Commission or presiding officer.

(6) Disclosure of the number, identity and qualifications of witnesses, and the nature of their testimony, particularly with respect to the policies of the Act and, as applicable according to the nature of the proceeding, each factor stated in section 3622 or 3623 of the Act.

(7) Limitation of the scope of the evidence and the number of witnesses to eliminate irrelevant, immaterial, or cumulative and repetitious evidence.

(8) Procedures to direct and control the use of discovery prior to the hearing and submission of written testimony and exhibits on matters in dispute so as to restrict to a bare minimum the amount of hearing time required for oral cross-examination of witnesses.

(9) Division of the proceeding where practicable into two or more phases for separate simultaneous hearings.

(10) Fixing dates for the submission and service of such written testimony and

exhibits as may be appropriate in advance of the hearing.

(11) Order of presentation of the evidence and cross-examination of witnesses so that the hearing may proceed in the most expeditious and orderly manner possible.

(12) All other matters which would aid in an expeditious disposition of the proceeding, including consent of the participants to the conduct of the entire proceedings off the record.

(e) *Rulings by presiding officer.* The presiding officer at such prehearing conference, irrespective of the consent of the participants, shall dispose of by ruling (1) any of the procedural matters itemized in paragraph (d) of this section and (2) such other procedural matters on which he is authorized to rule during the course of the hearing if ruling at this stage would expedite the proceeding. Either on the record at the conclusion of such prehearing conference, or by order issued shortly thereafter, the presiding officer shall state the agreements reached by the participants, the actions taken, and the rulings made by the presiding officer. Such rulings shall control the subsequent course of the proceedings unless modified at the hearing to prevent manifest injustice.

§ 3001.25 Interrogatories for purpose of discovery.

(a) *Service and contents.* In the interest of expedition and limited to information which appears reasonably calculated to lead to the discovery of admissible evidence, any participant may serve upon any other participant in a proceeding written interrogatories, including request for nonprivileged information relevant to the subject matter in such proceeding, to be answered by the participant served who shall furnish such information as is available to the participant. A participant through interrogatories may require each person whom the other participant expects to call as a witness at the hearing and to state the subject matter on which the witness is expected to testify.

(b) *Answers and objections.* Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. An interrogatory otherwise proper is not necessarily objectionable because an answer would involve an opinion or contention that relates to fact or the application of law to fact, but the Commission or presiding officer may order that such an interrogatory need not be answered until a prehearing conference or other later time. The answers are to be signed by the person making them and the objections signed by the attorney making them. The party upon whom the interrogatories have been served shall serve a copy of the answers and objections if any, within 10 days after service of the interrogatories or within such other period as may be fixed by the presiding officer, but before the conclusion of the hearing.

(c) *Supplemental answers.* A participant who has answered interrogatories is

under the duty to seasonably amend a prior answer if he obtains information upon the basis of which he knows that the answer was incorrect when made or is no longer true.

(d) *Orders.* The Commission or the presiding officer may order that any participant or person shall answer on such terms and conditions as are just and may for good cause make any protective order, including an order limiting or conditioning interrogatories, as justice requires to protect a party or person from undue annoyance, embarrassment, oppression, or expense.

§ 3001.26 Requests for production of documents or things for purpose of discovery.

(a) *Service and contents.* In the interest of expedition and limited to information which appears reasonably calculated to lead to the discovery of admissible evidence, any participant may serve on any other participant to the proceeding a request to produce and permit the participant making the request, or someone acting in his behalf, to inspect and copy any designated documents or things which constitute or contain matters, not privileged, which are relevant to the subject matter involved in the proceeding and which are in the custody or control of the participant upon which the request is served. The request shall set forth the items to be inspected either by individual item or category, and describe each item and category with reasonable particularity, and shall specify a reasonable time, place and manner of making inspection.

(b) *Answers and objections.* The participant upon whom the request is served shall serve a written answer on the participant who filed the request within 5 days after the service of the request; or within such other period as may be fixed by the presiding officer. The answer shall state, with respect to each item or category, that inspection will be permitted as requested unless the request is objected to, in which event the reason for the objection shall be stated. If objection is made to part of an item or category, the part shall be specified.

(c) *Orders.* The Commission or the presiding officer may, on such terms and conditions as are just and reasonable, order that any participant in a proceeding shall respond to a request for inspection, and may make any protective order of the nature provided in paragraph (d) of § 3001.25 as may be appropriate.

§ 3001.27 Requests for admissions for purpose of discovery.

(a) *Service and content.* In the interest of expedition any participant may serve upon any other participant a written request for the admission, for purposes of the pending proceeding only, of any relevant, unprivileged facts, including the genuineness of any documents or exhibits to be presented in the hearing.

(b) *Answers and objections.* Each matter of which an admission is requested shall be separately set forth and is admitted unless within 10 days after service of the request, or within such

other period as may be fixed by the presiding officer, the participant to whom the request is directed serves upon the participant requesting the admission a written answer or objection addressed to the matter which shall be signed by the participant or his attorney.

(c) *Orders.* If the Commission or presiding officer determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served, or may determine that final disposition of the request be made at a pretrial conference or at a designated time prior to the hearing.

§ 3001.28 Failure to comply with orders for discovery.

If a participant or an officer or agent of a participant fails to obey an order of the Commission or the presiding officer to provide or permit discovery, pursuant to §§ 3001.25 to 3001.27, the Commission or the presiding officer may make such orders in regard to the failure as are just, and among others, may direct that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the proceeding in accordance with the claim of the participants obtaining the order, or prohibit the disobedient participant from introducing designated matters in evidence, or strike the evidence, complaint or pleadings or parts thereof.

§ 3001.29 Settlement conferences.

Any participant in a proceeding may submit offers of settlement or proposals of adjustment at any time and may request a conference between the participants to consider such offers or proposals. The Commission or the presiding officer shall afford the participants appropriate opportunity prior to or during the hearing for conferences for the purpose of considering such offers or proposals as time, the nature of the proceeding, and the public interest permit. Unaccepted offers of settlement or adjustment and proposed stipulations not agreed to shall be privileged and shall not be admissible in evidence against any participant claiming such privilege.

§ 3001.30 Hearings.

(a) *How Initiated.* Hearings for the purpose of taking evidence shall be initiated by the issuance of a notice by the Commission as provided in § 3001.19.

(b) *Presiding officer.* All hearings shall be held before the Commission sitting en banc, or a duly designated presiding officer.

(c) *Entering of appearances.* The Commission or the presiding officer before whom the hearing is held will cause to be entered on the record all appearances together with a notation showing in whose behalf each such appearance has been made.

(d) *Order of procedure.* In public hearings before the Commission, the Postal Service shall open and close in proceedings which it has initiated under section 3622, 3623, or 3661 of the Act, and a complainant shall open and close

in proceedings on complaints filed under section 3662 of the Act. With respect to the order of presentation of all other participants, and in all other proceedings, unless otherwise ordered by the Commission, the presiding officer shall direct the order of presentation of evidence and issue such other procedural orders as may be necessary to assure the orderly and expeditious conclusion of the hearing.

(e) *Presentation by parties.* Any participant shall have the right in public hearings of presentation of evidence, cross-examination, objection, motion, and argument. When objections to the admission or exclusion of evidence before the Commission or the presiding officer are made, the grounds relied upon shall be stated briefly. Formal exceptions to rulings are unnecessary.

(f) *Limitations on presentation of the evidence.* The taking of evidence shall proceed with all reasonable diligence and dispatch, and to that end, the Commission or the presiding officer may limit appropriately (1) the number of witnesses to be heard upon any issue, (2) the examination by any participant to specific issues, and (3) the cross-examination of a witness to that required for a full and true disclosure of the facts necessary for the disposition of the proceeding and to avoid irrelevant, immaterial, or unduly repetitious testimony.

(g) *Motions during hearing.* After a hearing has commenced in a proceeding, a request may be made by motion to the presiding officer for any procedural ruling or relief desired. Such motions shall set forth the ruling or relief sought, and state the grounds therefor and statutory or other supporting authority. Motions made during hearings may be stated orally upon the record, except that the presiding officer may require that such motions be reduced to writing and filed separately. Any participant shall have the opportunity to answer or object to such motions at the time and in the manner directed by the presiding officer.

(h) *Rulings on motions.* The presiding officer is authorized to rule upon any such motion not formally acted upon by the Commission prior to the commencement of a prehearing conference or hearing where immediate ruling is essential in order to proceed with the prehearing conference or hearing, and upon any motion to the presiding officer filed or made after the commencement thereof, except that no motion made to the presiding officer, a ruling upon which would involve or constitute a final determination of the proceeding, shall be ruled upon affirmatively by the presiding officer except as a part of his intermediate decision. This section shall not preclude a presiding officer, within his discretion, from referring any motion made in hearing to the Commission for ultimate determination.

§ 3001.31 Evidence.

(a) *Form and admissibility.* In any public hearing before the Commission, or a presiding officer, relevant and material evidence which is not unduly repetitious or cumulative shall be admissible.

Witnesses whose testimony is to be taken shall be sworn, or shall affirm, before their testimony shall be deemed evidence in the proceeding or any questions are put to them.

(b) *Documentary.* Documents and detailed data and information shall be presented as exhibits. Where relevant and material matter offered in evidence is embraced in a document containing other matter not material or relevant or not intended to be put in evidence, the participant offering the same shall plainly designate the matter offered excluding the immaterial or irrelevant parts. If other matter in such document is in such bulk or extent as would unnecessarily encumber the record, such document may be marked for identification, and, if properly authenticated, the relevant and material parts thereof may be read into the record, or, if the Commission or the presiding officer so directs, a true copy of such matter in proper form shall be received in evidence as an exhibit. Copies of documents shall be delivered by the participant offering the same to the other participants or their attorneys appearing at the hearing, who shall be afforded an opportunity to examine the entire document and to offer in evidence in like manner other material and relevant portions thereof.

(c) *Commission's files.* In case any matter contained in a report or other document on file with the Commission is offered in evidence, such report or other document need not be produced or marked for identification, but may be offered in evidence by specifying the report, document, or other file containing the matter so offered.

(d) *Public document items.* Whenever there is offered in evidence (in whole or in part) a public document, such as an official report, decision, opinion or published scientific or economical statistical data issued by any of the Executive Departments (or their subdivisions), legislative agencies or committees, or administrative agencies of the Federal Government (including Government-owned corporations) and such document (or part thereof) has been shown by the offeror thereof to be reasonably available to the public, such document need not be produced or physically marked for identification, but may be offered in evidence as a public document item by clearly identifying the document and the relevant parts thereof.

(e) *Prepared testimony.* Unless the presiding officer otherwise directs, the direct testimony of witnesses shall be reduced to writing and offered either as such or as an exhibit.

(f) *Form of prepared testimony and exhibits.* All prepared testimony and exhibits of a documentary character shall, so far as practicable, conform to the requirements of § 3001.10 (a) and (b).

(g) *Copies to participants.* Except as otherwise provided in these rules, copies of prepared testimony and exhibits shall be furnished to the presiding officer and to the participants or counsel, unless the presiding officer otherwise directs. In addition, unless otherwise directed by the

presiding officer, eight copies of all prepared testimony and exhibits shall be furnished for the use of the Commission.

(h) *Reception and ruling.* The presiding officer shall rule on the admissibility of evidence and otherwise control the reception of evidence so as to confine it to the issues in the proceeding.

(i) *Offers of proof.* Any offer of proof made in connection with any ruling of the presiding officer rejecting or excluding proffered oral testimony shall consist of a statement of the substance of the evidence which counsel contends would be adduced by such testimony; and if the excluded evidence consists of evidence in documentary or written form, or of reference to documents or records, a copy of such evidence shall be marked for identification and shall constitute the offer of proof.

(j) *Official notice of facts.* Official notice may be taken of such matters as might be judicially noticed by the courts of the United States or of any other matter peculiarly within the general knowledge of the Commission as an expert body: *Provided*, That any participant shall, on timely request, be afforded an opportunity to show the contrary.

§ 3001.32 Appeals from rulings of the presiding officer.

(a) *During hearing or conference.* Rulings of the presiding officer may be appealed by participants during the course of conferences or hearings only in extraordinary circumstances where the presiding officer shall find that prompt decision by the Commission is necessary to prevent detriment to the public interest. In such instance the appeal shall be referred forthwith by the presiding officer to the Commission for determination.

(b) *Commission action.* Unless the Commission acts upon questions referred by the presiding officer within 7 days after referral, the appeal shall be deemed to be denied. The participants in the proceeding shall be notified by the presiding officer of the date of referral.

§ 3001.33 Depositions.

(a) *When permissible.* The testimony of a witness may be taken by deposition upon authorization by the Commission or the presiding officer on application of any participant before the hearing is closed. An authorization to take the deposition of a witness will be issued only if (1) the person whose deposition is to be taken would be unavailable at the hearing, or (2) the deposition is deemed necessary to perpetuate the testimony of the witness, or (3) the taking of the deposition is necessary to prevent undue and excessive expense to a participant and will not result in undue delay or an undue burden to other participants.

(b) *Application.* An application for authorization to take testimony by deposition shall be filed in duplicate with the Commission or the presiding officer and shall state (1) the name, identification, and post office address of the witness, (2) the subject matter of the testimony, (3) the time and place of taking the dep-

osition, (4) the name, identification, and post office address of the officer before whom the deposition is to be taken, and (5) the reasons why the testimony of such witness should be taken by deposition.

(c) *Authorization.* If the application so warrants, the Commission or the presiding officer will issue and serve or cause to be served on the participants within a reasonable time in advance of the time fixed for taking testimony, an authorization for the taking of such testimony by deposition. Such authorization shall name the witness, and the time, place, and officer before whom the deposition shall be taken, and shall specify the number of copies of the deposition to be submitted to the Commission. The authorization may include such terms and conditions as the Commission or the presiding officer deems fair and reasonable.

(d) *Qualifications of officer before whom taken.* Such deposition may be taken before a presiding officer or other authorized representative of the Commission, or any officer, not being counsel or attorney for any participant or having an interest in the proceeding, authorized to administer oaths by the laws of the United States or of the place where the deposition is to be taken.

(e) *Oath and reduction to writing.* The officer before whom the deposition is to be taken shall put the witness on oath or affirmation and shall personally, or by some one acting under his direction and in his presence, record the examination of the witness. The examination shall be transcribed in the form specified in § 3001.10(a), signed by the witness, and certified in the usual form by the officer. The original of the deposition, together with the number of copies required by the authorization to be made by such officer, shall be forwarded by the officer to the Secretary by personal delivery or registered mail. Upon receipt the Secretary shall hold the original for use in the hearing upon request by any participant and shall make copies available for public inspection.

(f) *Scope and conduct of examination.* Unless otherwise directed in the authorization, the witness may be questioned regarding any matter which is relevant to the issues involved in the proceeding. Participants shall have the right of cross-examination and objection. In lieu of participation in the oral examination, participants may transmit written interrogatories to the officer who shall propound them to the witness.

(g) *Objections.* The officer before whom the deposition is taken shall not have the power to rule upon procedural matters or the competency, materiality, or relevancy of questions. Procedural objections or objections to questions of evidence shall be stated briefly and recorded in the deposition without argument. Objections not stated before the officer shall be deemed waived.

(h) *When a part of the record.* No portion of a deposition shall constitute a part of the record in the proceeding unless received in evidence by the presiding officer. If only a portion of the

deposition is offered in evidence by a participant, any other participant may require him to introduce all of it which is relevant to the part introduced, and any participant may offer in evidence any other portions.

(i) *Fees.* Witnesses whose depositions are taken and the officer taking the same shall be entitled to the same fees as are paid for like services in the District Courts of the United States to be paid directly by the participant or participants on whose application the deposition was taken.

§ 3001.34 Briefs.

(a) *When filed.* Such briefs shall be filed in any proceeding as may be ordered by the Commission or the presiding officer. The determination of what, if any, briefs are to be filed and the time to be allowed for the filing of briefs shall give regard to the timely issuance of a recommended decision or advisory opinion to the Postal Service within the contemplation of sections 3641(a) and 3661 of the Act. In addition, subject to such consideration, due regard shall be given to the nature of the proceeding, the complexity and importance of the issues involved, and the magnitude of the record. In cases subject to a limitation on the time available to the Commission for decision, the Commission shall generally direct that each participant shall file a single brief at the same time. In cases where, because of the nature of the issues and the record or the limited number of participants involved, the filing of initial and reply briefs or the filing of initial, answering, and reply briefs, will not unduly delay the conclusion of the proceeding and will aid in the proper disposition of the proceeding, the participants may be directed to file more than one brief and at different times rather than a single brief at the same time.

(b) *Contents.* Each brief filed with the Commission shall be as concise as possible, within any page limitation specified by the Commission or the presiding officer, and shall include the following in the order indicated:

(1) A subject index with page references, and a list of all cases and authorities relied upon, arranged alphabetically, with references to the pages where the citation appears;

(2) A concise statement of the case from the viewpoint of the filing participant;

(3) A clear, concise and definitive statement of the position of the filing participant as to the proposals of the Postal Service, the subject matter of the complaint, or recommended decision, advisory opinion, or public report to be issued;

(4) A discussion of the evidence, reasons, and authorities relied upon with exact references to the record and the authorities; and

(5) Proposed findings and conclusions with appropriate references to the record or the prior discussion of the evidence and authorities relied upon.

(c) *Incorporation by references.* Briefs before the Commission or a presiding officer shall be completely self-contained and shall not incorporate by reference any portion of any other brief, pleading or document.

(d) *Excerpts from the record.* Testimony and exhibits shall not be quoted or included in briefs except for short excerpts pertinent to the argument presented.

(e) *Filing and service.* Briefs shall be filed in the form and manner and served as required by §§ 3001.9 to 3001.12.

§ 3001.35 Proposed findings and conclusions.

In lieu of formal briefs the Commission or the presiding officer may direct the filing of proposed findings and conclusions with a brief statement of the supporting reasons for each proposed finding and conclusion.

§ 3001.36 Oral argument before the presiding or other designated officer.

In any case in which the presiding officer is to issue an initial or recommended decision, or another designated officer of the Commission is to issue a recommended decision, such officer may permit the presentation of oral argument before him when, in his opinion, time permits, and the nature of the proceedings, the complexity or importance of the issues of fact or law involved, and the public interest warrants his hearing such argument. Such officer shall determine the time and place for oral argument. He may specify the issue or issues on which oral argument is to be presented, the order in which the presentations shall be made, and the amount of time allowed each participant. A request for oral argument before the issuance of an intermediate decision shall be made during the course of the hearing on the record.

§ 3001.37 Oral argument before the Commission.

(a) *When ordered.* In any proceeding before the Commission for decision, the Commission, upon the request of any participant or on its own initiative, may order oral argument when, in the Commission's discretion, time permits, and the nature of the proceedings, the complexity or importance of the issues of fact or law involved, and public interest warrants such argument.

(b) *How requested.* Any participant in a proceeding before the Commission for decision may request oral argument before the Commission by filing a timely motion pursuant to § 3001.21. In a proceeding before the Commission on exceptions to an intermediate decision, such motion shall be filed no later than the date for the filing of briefs on exceptions. Motions requesting oral argument may be included in briefs or briefs on exceptions or in a separate document.

(c) *Notice of oral argument.* The Commission shall rule on requests for oral argument, and if argument is allowed, the Commission shall notify the participants of the time and place set for argument, the amount of time al-

lowed each participant, and the issue or issues on which oral argument is to be heard. Unless otherwise ordered by the Commission, oral argument shall be limited to matters properly raised on the record and in the briefs before the Commission.

(d) *Use of documents at oral argument.* Charts, graphs, maps, tables and other written material may be presented to the Commission at oral argument only if limited to facts in the record of the case being argued and if copies of such documents are filed with the Secretary and served on all parties at least 7 days in advance of the argument. Enlargements of such charts, graphs, maps and tables may be used at the argument provided copies are filed and served as required by this paragraph.

§ 3001.38 Omission of intermediate decisions.

(a) *Basis of omission.* In any proceeding noticed pursuant to § 3001.17, the Commission, on the motion of any participant or on its own initiative, may direct the certification of the record to the Commission and omit any intermediate decision upon a finding on the record that due and timely execution of its functions imperatively and unavoidably so requires. In proceedings in which all participants concur in a request by any participant that any intermediate decision be omitted, the Commission shall direct the certification of the record to the Commission and forthwith render a final decision unless the Commission denies such request within 10 days next following its filing or referral by the presiding officer.

(b) *Requests for omission.* Requests for omission of the intermediate decision in any proceeding shall be made by motion pursuant to § 3001.21 or made orally on the record before the presiding officer who shall promptly refer the same to the Commission. Such requests shall specify (1) the concurrence of other parties and (2) whether opportunity for filing briefs or presenting oral argument to the Commission is desired or waived. Failure of any party to object to such request shall constitute a waiver of any objections.

§ 3001.39 Intermediate decisions.

(a) *Initial decision by presiding officer.* In any proceedings in which a Commissioner or hearing officer has presided at the reception of evidence, such presiding officer, as soon as practicable after the conclusion of the hearing and the filing of briefs, shall certify and file with the Secretary, a copy of the record of the hearing and his initial decision on the matters and issues presented for decision in such proceeding.

(b) *Tentative decision.* Prior to the issuance of an initial decision by the presiding officer, the Commission, with notice to the participants or by order in specific cases or by general rule for a class of cases, may direct the certification of the record to the Commission for the purpose of the issuance of a tentative decision. In such cases, the Commission

may issue a tentative decision or require that the presiding officer or any designated responsible officer of the Commission recommend a decision.

(c) *Contents.* All intermediate decisions (initial, recommended or tentative) shall include (1) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record, and (2) the appropriate recommended decision, advisory opinion or public report pursuant to the Act. An intermediate decision in a proceeding under section 3622 or 3623 of the Act shall include a statement specifically responsive to the criteria established under section 3622 or 3623 of the Act, as the case may be; and an intermediate decision in a proceeding under section 3661 of the Act shall include a determination of the question of whether or not the proposed change in the nature of postal service conforms to the policies established under the Act.

(d) *Service and Commission review.* All intermediate decisions shall be part of the record, shall be served on the participants to the proceeding by the Secretary pursuant to § 3001.12 and shall be subject to review by the Commission on its own initiative, or the filing of exceptions by the participants pursuant to § 3001.40.

(e) *Unavailability of presiding officer.* In any proceeding in which the intermediate decision is not omitted pursuant to § 3001.38, if a presiding officer becomes unavailable to issue an intermediate decision on a timely basis, the Commission shall, by a notice served on the participants require the record to be certified to it and it shall either designate a qualified responsible officer of the Commission to issue a recommended decision or will itself issued a tentative decision, as the Commission may deem appropriate.

(f) *Effect of intermediate decision.* Unless briefs on exceptions are filed to an intermediate decision pursuant to § 3001.40 or unless the Commission issues an order to review an intermediate decision on its own initiative, the intermediate decision shall become the final action of the Commission after 30 days from the date of issuance thereof. If briefs on exceptions are timely filed or the Commission initiates review on its own motion, the intermediate decision is stayed until further order of the Commission.

§ 3001.40 Exceptions to intermediate decisions.

(a) *Briefs on exceptions and opposing exceptions.* Any participant in a proceeding may file exceptions to any intermediate decision by filing a brief on exceptions with the Commission within 15 days after the date of issuance of the intermediate decision or such other time as may be fixed by the Commission. Any participant to a proceeding may file a response to briefs on exceptions within 15 days after the time limited for the filing of briefs on exceptions or such other time as may be fixed by the Commission. No

further response will be entertained unless the Commission upon motion for good cause shown or on its own initiative, so orders.

(b) *Filing and contents.* Briefs on exceptions and briefs opposing exceptions shall be filed in accordance with § 3001.34. In briefs on exceptions, the discussion of evidence, reasons and authorities shall be specifically directed to the findings, conclusions and recommendations in the intermediate decision to which exception is taken. Briefs on exceptions should not include a discussion of evidence and authorities on matters and issues to which no exception to the intermediate decision is taken. Briefs on exceptions and briefs opposing exceptions need not contain a statement of the case to the extent that it was correctly stated in either the intermediate decision or the brief on exceptions of another participant to which reference is made.

(c) *Failure to except results in waiver.* Any participant who fails to except or object to any part of an intermediate decision in its brief on exceptions may not thereafter raise such exceptions or objections which shall be deemed to have been waived.

§ 3001.41 Rulemaking proceedings.

(a) *General notice.* Before the adoption of any rule of general applicability, or the commencement of any hearing on any such proposed rulemaking, the Commission will cause general notice to be given by publication in the FEDERAL REGISTER, such notice to be published therein not less than 15 days prior to the date fixed for the consideration of the adoption of a proposed rule or rules or for the commencement of the hearing, if any, on the proposed rulemaking, except where a shorter period is reasonable and good cause exists therefor. However, where the Commission, for good cause, finds it impracticable, unnecessary, or contrary to the public interest to give such notice, it may proceed with the adoption of rules without notice by incorporating therein a finding to such effect and a concise statement of the reasons therefor.

(b) *Contents of notice.* The notice shall include (1) a statement of the time, place and nature of the public rulemaking proceedings; (2) reference to the legal authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

(c) *Participation.* After notice given as provided in paragraph (a) of this section, the Commission shall give interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments with or without opportunity for oral presentation.

(d) *General statement as to basis and purpose.* After consideration of the relevant matter presented, the Commission shall incorporate in the rules adopted a concise general statement of their basis and purpose.

(e) *Exceptions.* Except when notice or hearing is required by statute, the Commission may issue at any time rules of organization, procedure or practice, or interpretive rules, or statements of policy, without notice or public procedure, and this section is not to be construed as applicable to the extent that there may be involved any military, naval or foreign affairs function of the United States, or any matter relating to the Commission's management or personnel, or to U.S. property, loans, grants, benefits, or contracts.

§ 3001.42 Public information and requests.

This section prescribes the rules governing: Publication of recommended decisions, advisory opinions, and public reports; and public records of the Commission.

(a) *Notice and publication.* Service of intermediate and recommended decisions, advisory opinions and public reports upon parties to the proceedings is provided in §§ 3001.12(a) and 3001.39(d). Descriptions of the Commission's organization, its methods of operation, statements of policy and interpretations, procedural and substantive rules, and amendments thereto will be filed with and published in the FEDERAL REGISTER. Commission recommended decisions, advisory opinions and public reports, Commission orders, and intermediate decisions will be released to the press and made available to the public promptly.

(b) *Public records.* The public records of the Commission, available upon specific request for inspection and copying during regular business hours in the Secretary's office include:

(1) All submittals and filings as follows:

(i) Requests of the Postal Service for recommended decisions or advisory opinions, public reports, complaints (both formal and informal) and other papers seeking Commission action;

(ii) Financial, statistical and other reports to the Commission, and other filings and submittals to the Commission in compliance with the requirements of any statute, Executive order, or Commission rule, regulation, or order;

(iii) All answers, replies, responses, objections, protests, motions, stipulations, exceptions, other pleadings, notices, depositions, certificates, proofs of service, transcripts, and briefs in any matter or proceeding;

(iv) All exhibits, attachments and appendices to, amendments and corrections of, supplements to, or transmittals or withdrawals of, any of the foregoing;

(v) Any Commission correspondence relating to any of the foregoing.

(2) All other parts of the formal record in any matter or proceeding set for formal or statutory hearing and any Commission correspondence related thereto. "Formal record" includes in addition to all the filings and submittals, any notice or Commission order initiating the matter or proceeding, and, if a hearing is held, the following: the designation of the presiding officer, transcript

of hearing, all exhibits received in evidence, offers of proof, motions, stipulations, proofs of service, referrals to the Commission, and determinations made by the Commission thereon, certifications to the Commission, and anything else upon which action of the presiding officer or the Commission may be based; it does not include any unaccepted offer of settlement made by a party in the course of a proceeding and not formally submitted to the Commission.

(3) Any proposed testimony or exhibit filed with the Commission but not yet offered or received in evidence.

(4) All presiding officer actions and all presiding officer correspondence and memoranda to or from others except within his own office.

(5) All Commission orders, notices, findings, determinations, and other actions in any matter or proceeding and all Commission minutes which have been approved.

(6) All Commission correspondence relating to any furnishing of data or information by the Postal Service.

(7) Commission correspondence with respect to the furnishing of data, information, comments, or recommendations to or by another branch, department, or agency of the Government where furnished to satisfy a specific requirement of a statute or where made public by that branch, department or agency.

(8) Commission correspondence and reports on legislative matters under consideration by the Office of Management and Budget or Congress but only if and after made public or released for publication by that Office or the Committee or Member of Congress involved.

(9) Commission correspondence on the interpretation or applicability of any statute, rule, regulation, recommended decision, advisory opinion, or public report issued or administered by the Commission and letters of opinion on that subject signed by the General Counsel and sent to others than the Commission, a Commissioner, or any of the staff.

(10) Copies of all filings by the Commission, and all orders, judgments, decrees, and mandates directed to the Commission in Court proceedings involving Commission action and all correspondence with the courts or clerks of court.

(11) The Commission's administrative and operating manuals as issued.

(12) All other records of the Commission except for those that are:

(i) Specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy;

(ii) Related solely to the internal personnel rules and practices of the Commission;

(iii) Specifically exempted from disclosure by statute;

(iv) Trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(v) Interagency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the Commission;

(vi) Personnel and medical files and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

(vii) Written communications between or among the Commission, members of the Commission, the Secretary, and expressly designated members of the staff while particularly assigned, in accordance with all applicable legal requirements, to aid the Commission in the drafting of any recommended decision, advisory opinion or public report and findings, with or without opinion, or report in any matter or proceeding;

(viii) Unaccepted offers of settlement in any matter or proceeding unless or until made public by act of the offeror.

(c) *Other records.* Records not made part of the public records by this section may be requested in writing, accompanied by a showing in support thereof, filed with the Secretary and will be made available for public reference upon good cause shown by order of the Commission where consistent with the public interest and permitted by the Commission's statutory authority.

(d) *Procedure in event of withholding of public records.* In any case where there is a question of interpretation under paragraph (b) of this section, the person seeking such record may request the Secretary, by petition to make such record available for inspection and copying. The Secretary shall either cause the record to be made available or shall state in writing the basis for his determination that the document requested is not a public record under paragraph (b) of this section. If the Secretary denies the petition, the person seeking the record may appeal such denial to the Commission by petition conforming to the requirements of §§ 3001.9 to 3001.12.

(e) *Procedure in event of subpoena.* If an officer or employee of the Commission is served with a subpoena duces tecum, material which is not part of the public files and records of the Commission shall be produced only as authorized by the Commission. Service of such a subpoena shall immediately be reported to the Commission with a statement of all relevant facts. The Commission will thereupon enter such order or give such instructions as it deems advisable.

Subpart B—Rules Applicable to Requests for Changes in Rates or Fees

§ 3001.51 Applicability.

The rules in this subpart govern the procedure with regard to requests of the Postal Service pursuant to section 3622 of the Act that the Commission submit a recommended decision on changes in a rate or rates of postage or in a fee or fees for postal service if the Postal Service determines that such changes would be in the public interest and in accordance with the policies of the Act. The Rules of General Applicability in Subpart A of this part are also applicable to proceedings on requests subject to this subpart.

§ 3001.52 Filing of formal requests.

Whenever the Postal Service determines to request that the Commission submit a recommended decision on changes in rates or fees subject to this subpart, the Postal Service shall file with the Commission a formal request for a recommended decision. Such request shall be filed in accordance with the requirements of §§ 3001.9 to 3001.11 and 3001.54.

§ 3001.53 Filing of prepared direct evidence.

Simultaneously with the filing of the formal request for a recommended decision under this subpart, the Postal Service shall file all of the prepared direct evidence upon which it proposes to rely in the proceeding on the record before the Commission to establish that the proposed changes or adjustments in rates or fees are in the public interest and are in accordance with the policies and the applicable criteria of the Act. Such prepared direct evidence shall be in the form of prepared written testimony and documentary exhibits which shall be filed in accordance with § 3001.31.

§ 3001.54 Contents of formal requests.

(a) *General requirements.* Each formal request filed under this subpart shall include such information and data and such statements of reasons and basis as are necessary and appropriate fully to inform the Commission and the parties of the nature, scope, significance and impact of the proposed changes or adjustments in rates or fees and to show that the changes or adjustments in rates or fees are in the public interest and in accordance with the policies of the Act and the applicable criteria of the Act. Detailed data, information, and statements of explanation or reasons set forth in the Postal Service's prepared direct evidence may be relied upon for purposes of the formal request without restatement therein by specific reference to the portions of the prepared direct evidence relied upon.

(b) *Specific information.* Subject to the right of the Commission to request additional information, each formal request shall include the following, where applicable:

(1) The then effective rate or rates of postage and fee or fees for postal service and the rate or rates of postage and fee or fees for postal service as proposed to be changed or adjusted by the Postal Service;

(2) The total estimated costs of the Postal Service as specified in section 3621 of the Act which forms the basis for the proposed change in rates or fees. Such estimated costs shall be for a twelve-month period beginning not more than 9 months subsequent to the filing date of the formal request. Operating expenses included in such costs shall be shown with such reasonable detail as to classification and with such reasonable explanation so that the estimated amount for each item of expense may be readily understood. The amounts in-

cluded for depreciation on capital facilities and equipment, debt service, and as a reasonable provision for contingencies shall be stated and explained in reasonable detail.

(3) Estimated revenues of the Postal Service from the then effective postal rates and fees and from the rates and fees as proposed to be changed or adjusted, shown separately by each class of mail or type of mail service and in total, and all other revenues of the Postal Service including appropriations, for the 12-month period utilized in the determination of the total estimated costs of the Postal Service upon which the request for changes in rates or fees is based;

(4) A statement of the actual costs and revenues of the Postal Service for the most recent 12-month period for which actual costs and revenues are reasonably available in the same detail as the estimated costs of the Postal Service upon which the request for changes in rates or fees is based, together with a comparison for each cost classification between actual costs thus shown and the estimated costs for the future 12-month period and an explanation of the reasons and basis for the differences;

(5) An analysis of the direct and indirect costs attributable to each class of mail or type of mail service and the portion of all other costs of the Postal Service reasonably assignable to each such class or type, together with a full statement and supporting information and data with regard to the nature and propriety of the costing concepts and the methods of cost allocation or assignment utilized;

(6) Such studies, information and data relevant to the criteria established by section 3622 of the Act with appropriate explanations as will assist the Commission in determining whether or not the proposed rates or charges for postal service are in accordance with such criteria.

§ 3001.55 Service by the Postal Service.

Immediately after the issuance of an order or orders by the Commission designating an officer of the Commission to represent the interests of the general public or granting petitions to intervene in a proceeding before the Commission under this subpart, the Postal Service shall serve copies of its formal request for a recommended decision and its prepared direct evidence upon such officer and the parties permitted to intervene as provided in § 3001.12.

Subpart C—Rules Applicable to Requests for Establishing or Changing the Mail Classification Schedule

§ 3001.61 Applicability.

The rules in this subpart govern the procedure with regard to requests of the Postal Service pursuant to section 3623 of the Act that the Commission submit a recommended decision on establishing or changing the mail classification schedule. The Rules of General Applicability in Subpart A of this part are also applicable to proceedings on requests subject to this subpart.

§ 3001.62 Filing of formal requests.

Whenever the Postal Service determines to request that the Commission submit a recommended decision on establishing or changing the mail classification schedule, the Postal Service shall file with the Commission a formal request for a recommended decision. Such request shall be filed in accordance with the requirements of §§ 3001.9 to 3001.11 and 3001.64.

§ 3001.63 Filing of prepared direct evidence.

Simultaneously with the filing of the formal request for a recommended decision under this subpart, the Postal Service shall file all of the prepared direct evidence upon which it proposes to rely in the proceeding on the record before the Commission to establish that the mail classification schedule or changes therein proposed by the Postal Service are in accordance with the policies and the applicable criteria of the Act. Such prepared direct evidence shall be in the form of prepared written testimony and documentary exhibits which shall be filed in accordance with § 3001.31.

§ 3001.64 Contents of formal requests.

(a) *General requirements.* Each formal request filed under this subpart shall include such information and data and such statements of reasons and basis as are necessary and appropriate fully to inform the Commission and the parties of the nature, scope, significance and impact of the proposed new mail classification schedule or the proposed changes therein and to show that the mail classification schedule as proposed to be established or changed is in accordance with the policies and the applicable criteria of the Act. Detailed data and information and statements of reasons or basis set forth in the Postal Service's prepared direct evidence may be relied upon for purposes of the formal request without restatement therein by reference in the request to the portions of the prepared direct evidence relied upon.

(b) *Specific information.* Subject to the right of the Commission to request additional information, each formal request shall include the following, where applicable:

(1) The then effective mail classification schedule and the mail classification schedule to be established; or, after the establishment of the mail classification schedule, the then effective mail classification schedule and the proposed changes;

(2) A full and complete statement of the reasons and basis for the Postal Service's proposed mail classification schedule or proposed changes therein;

(3) Such studies, information and data relevant to the applicable criteria of the Act that will assist the Commission in determining whether or not the proposed mail classification schedule or proposed changes therein are in accordance with the policies and the applicable criteria of the Act;

(4) To the extent that the proposed mail classification schedule or proposed

changes therein involve a change in rates or fees, such studies, information and data relevant to the criteria established by section 3622 of the Act as will assist the Commission in determining whether or not the proposed rates or charges for postal service are in accordance with such criteria; and

(5) To the extent that the proposed mail classification schedule or proposed changes therein involve changes in rates or fees which significantly increases the Postal Service's total revenues from rates and fees, such portion of the information and data and statement of reasons and basis specified for a formal request for a recommended decision for proposed changes in rates or fees in § 3001.54 as is necessary and appropriate to support and justify the proposed revenue increase.

§ 3001.65 Service by the Postal Service.

Immediately after the issuance of an order or orders by the Commission designating an officer of the Commission to represent the interests of the general public or granting petitions to intervene in a proceeding before the Commission under this subpart, the Postal Service shall serve copies of its formal request for a recommended decision and its prepared direct evidence upon such officer and the parties permitted to intervene as provided in § 3001.12.

Subpart D—Rules Applicable to Requests for Changes in the Nature of Postal Services.

§ 3001.71 Applicability.

The rules in this subpart govern the procedure with regard to proposals of the Postal Service pursuant to Section 3661 of the Act requesting from the Commission an advisory opinion on changes in the nature of postal services which will generally affect service on a nationwide or substantially nationwide basis. The Rules of General Applicability in Subpart A of this part are also applicable to proceedings on requests subject to this subpart.

§ 3001.72 Filing of formal requests.

Whenever the Postal Service determines to request that the Commission issue an advisory opinion on a proposed change in the nature of postal services subject to this subpart, the Postal Service shall file with the Commission a formal request for such an opinion in accordance with the requirements of §§ 3001.9 to 3001.11 and 3001.74. Such request shall be filed not less than 90 days in advance of the date on which the Postal Service proposes to make effective the change in the nature of postal services involved.

§ 3001.73 Filing of prepared direct testimony.

Simultaneously with the filing of a formal request for an advisory opinion under this subpart, the Postal Service shall file all of the prepared direct evidence upon which it proposes to rely in the proceeding on the record before the

Commission to establish that the proposed change in the nature of postal services is in accordance with and conforms to the policies of the Act. Such prepared direct evidence shall be in the form of prepared written testimony and documentary exhibits which shall be filed in accordance with § 3001.31.

§ 3001.74 Contents of formal requests.

(a) *General requirements.* Each formal request filed under this subpart shall include such information and data and such statements of reasons and basis as are necessary and appropriate to fully inform the Commission and the parties of the nature, scope, significance and impact of the proposed change in the nature of postal services and to show that such change in the nature of postal service is in accordance with and conforms to the policies established under the Act. Detailed data and information and statements of reasons or basis set forth in the Postal Service's prepared direct evidence may be relied upon for purposes of the formal request without restatement therein by reference in the request to the portions of the prepared direct evidence relied upon.

(b) *Specific information.* Subject to the right of the Commission to request additional information, each formal request shall include the following:

(1) A detailed statement of the present nature of the postal services proposed to be changed and the change proposed;

(2) The proposed effective date for the proposed change in the nature of postal services;

(3) A full and complete statement of the reasons and basis for the Postal Service's determination that the proposed change in the nature of postal services is in accordance with and conforms to the policies of the Act.

§ 3001.75 Service by the Postal Service.

Immediately after the issuance of an order or orders by the Commission designating an officer of the Commission to represent the interests of the general public or granting petitions to intervene in a proceeding before the Commission in a proceeding under this subpart, the Postal Service shall serve copies of its formal request for an advisory opinion and its prepared direct evidence upon such officer and the parties permitted to intervene as provided by § 3001.12.

Subpart E—Rules Applicable to Rate and Service Complaints

§ 3001.81 Applicability.

The rules in this subpart govern the procedure with regard to rate and service complaints filed under section 3662 of the Act. The Rules of General Applicability in Subpart A of this part are also applicable to proceedings on such complaints.

§ 3001.82 Scope and nature of complaints.

Interested parties who believe the Postal Service is charging rates which do not conform to the policies set out in

the Act, or who believe that they are not receiving postal service in accordance with the policies of such title, may file and serve a written complaint with the Commission in the form and manner required by §§ 3001.9 to 3001.12. The Commission shall entertain only those complaints which clearly raise an issue concerning whether or not rates or services contravene the policies of the Act; thus, complaints raising a question as to whether the Postal Service has properly applied its existing rates and fees or mail classification schedule to a particular mail user or with regard to an individual, localized, or temporary service issue not on a substantially nationwide basis shall generally not be considered as properly raising a matter of policy to be considered by the Commission. The Commission shall, in the exercise of its discretion, decline to entertain a complaint during the period the complainant is continuing to pursue the general subject matter of the complaint before a hearing examiner or the judicial officer of the Postal Service.

§ 3001.83 Contents of complaints.

Subject to the right of the Commission to require the furnishing of additional information, each complaint shall include the following information:

(a) The full name and address of the complainant(s):

(b) A full and complete statement of the grounds for such complaint, including specific reference to the postal rates or services involved and the policies to which it is claimed they do not conform;

(c) A list or description of all persons or classes of persons known or believed to be similarly affected by the rates or services involved in the complaint;

(d) A statement of the specific relief or redress requested;

(e) Copies of all correspondence or written communications between the complainant, his agent, representative, or attorney, and the Postal Service or any officer, employee or instrumentality thereof, and which relates to the subject matter of the complaint; provided, however, that any such documents which are a part of a public file in any proceeding before a hearing examiner or the Judicial Officer of the Postal Service need not be included if the complaint states the title, docket reference, nature, current status, and disposition of such proceeding.

§ 3001.84 Answers by the Postal Service.

Within 30 days after the filing of a complaint, with the Commission the Postal Service shall file and serve an answer in the form and manner required by §§ 3001.9 to 3001.12. Such answer shall include the following:

(a) Specific admission, denial or explanation of each fact alleged in the complaint or, if the Postal Service is without knowledge thereof, a statement to that effect. Each fact alleged in a complaint not thus specifically answered shall be deemed to have been admitted;

(b) A statement as to the position of the Postal Service on the allegations in the complaint that the rates or service involved are not in accord with the policies of the Act, and the facts and reasons in support of such position;

(c) The position of the Postal Service on the specific relief or redress requested by the complainant, the disposition of the complaint recommended by the Postal Service, including whether or not a hearing should be held, and a statement of any facts and reasons in support of such position.

§ 3001.85 Informal procedures.

It shall be the general policy and practice of the Commission to encourage the resolution and settlement of complaints by informal procedures, including correspondence, conferences between the parties, and the conduct of proceedings off the record with the consent of the parties.

§ 3001.86 Proceedings on the record.

If a complaint is not resolved or settled under informal procedures, the Commission shall consider whether or not, in its discretion, a proceeding on the record with an opportunity for hearing should be held on such complaint. If the Commission has reason to believe that the complaint may be justified and that a hearing may otherwise be appropriate in the exercise of its discretion, the Commission shall issue a notice of proceeding pursuant to § 3001.17, and further formal proceedings shall then be held as appropriate under the Commission's rules in Subpart A of this part.

§ 3001.87 Commission determinations.

If the Commission determines, after the completion of proceedings which provide an opportunity for hearing, that a complaint is justified in whole or in part, the Commission shall issue a recommended decision to the Postal Service if the complaint involves a matter of rates and fees or mail classification and shall render a public report if the complaint involves other matters. The Commission shall notify the complainant, the Postal Service, and any other parties in each complaint proceeding of the action taken or the final disposition of the complaint.

[FR Doc.71-376 Filed 1-11-71;8:45 am]

Number of Interrogatories Filed in Selected N-Cases

Docket No.	Name	No. of Interrogatories
N2012-2	Greeting Cards Assn.	0
N2012-2	Greta Cobar	0
N2012-2	Coalition to Save the Venice Post Office	0
N2012-2	David Popkin	32
N2012-1	Douglas Carlson	25
N2012-1	City of Pasadena, CA	0
N2012-1	David B. Popkin	54
N2011-1	Douglas Carlson	0
N2011-1	Greeting Card Assn.	0
N2011-1	National Postal Policy Council	0
N2011-1	Assn. of U.S. Postal Lessors	0
N2011-1	David Popkin	82
N2010-1	Associated Mail and Parcel Association (AMPA)*	0
N2010-1	Douglas F. Carlson (Carlson)*	168
N2010-1	Khaled Ghamraoui (Ghamraoui)*	0
N2010-1	Mary Famoso-Rueda (Famoso-Rueda)*	0
N2010-1	National Association of Postmasters of the United States (NAPUS)*	0
N2010-1	Pharmaceutical Care Management Association (PCMA)*	0
N2010-1	David B. Popkin (Popkin)*	74
N2009-1	Direct Marketing Association (DMA)*	0
N2009-1	Douglas F. Carlson (Carlson)*	0
N2009-1	Greeting Card Association (GCA)*	0
N2009-1	National Association of Postmasters of the United States (NAPUS)*	0
N2009-1	National League of Postmasters (League)*	0
N2009-1	National Newspaper Association (NNA)*	0
N2009-1	David B. Popkin (Popkin)*	47
N2009-1	Parcel Shippers Association (PSA)*	0
N2009-1	Pitney Bowes Inc. (Pitney Bowes)*	0
N2006-1	Douglas F. Carlson (Carlson)*	15
N2006-1	National Postal Mail Handlers Union (NPMHU)*	0
N2006-1	David B. Popkin (Popkin)*	100

[Standard Form]

Before the
POSTAL REGULATORY COMMISSION
WASHINGTON DC 20268-0001

^Caption of Docket

Docket No. N20^^^

Notice of Intent to File Rebuttal Testimony

(^Month, Date, Year)

[Name of participant] elects, pursuant to 39 C.F.R. 3001.90(c), to file rebuttal testimony in the captioned proceeding.

Rebuttal testimony is being filed for [insert number] witness(es).

Witness name/ position/ title (if known), by witness:

The subject matter of the testimony (by witness):

Number of supporting library references or exhibits, to the extent known, by witness:

Confirmation of witness availability:

Respectfully submitted,

[Standard signature and contact information]